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NO. 84-

In The

# Supreme Court of the United States

October Term, 1984

GLORIA R. SMITH,

*Petitioner,*

v.

RONALD E. SORENSEN, Commissioner of Labor, Department of Labor, State of Nebraska; WILLIAM R. LODER, Director, Comprehensive Employment and Training Unit, Department of Labor, State of Nebraska; DEPARTMENT OF LABOR, State of Nebraska; DIRECTOR OF THE MERIT SYSTEM OF THE STATE OF NEBRASKA; and STATE OF NEBRASKA,

*Respondents.*

RICHARD GETTEMY and DONNA POLK,

*Petitioners,*

v.

RONALD E. SORENSEN, et al.,

*Respondents.*

JAMES L. BAUDLER,

*Petitioner,*

v.

RONALD E. SORENSEN, et al.,

*Respondents.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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March 5, 1985

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## QUESTION PRESENTED

Is a federal court bound, under the Tenth Amendment and Article III, Section 2 of the United States Constitution, to apply state law in determining the terms of a contract between a state and its employees?

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No. 84.....

In The

# Supreme Court of the United States

October Term, 1984

GLORIA R. SMITH,

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v.

RONALD E. SORENSEN, et al.,

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RICHARD GETTEMY and DONNA POLK,

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JAMES L. BAUDLER,

Petitioner,

v.

RONALD E. SORENSEN, et al,.

Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, four employees of the Department of Labor of the State of Nebraska, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on November 5, 1984. These cases are joined under Rule 19.4.

## OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at App. 1a—App. 25a (Appendix Exhibit A). The opinion of the District Court for the District of Nebraska, not reported, appears in the Appendix hereto at App. 28a—App. 91a (Appendix Exhibit C).

———o———

## JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on November 5, 1984, and appears in the Appendix hereto at App. 26a—App. 27a (Appendix Exhibit B). A timely petition for rehearing was denied on December 6, 1984, and appears in the Appendix hereto at App. 91a—App. 92a (Appendix Exhibit D). This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Constitutional, statutory, and regulatory provisions involved in this case are set forth in the Appendix as Exhibit E, App. 92a—App. 100a.

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## STATEMENT OF FACTS

In November of 1974, the Nebraska Department of Labor, a state executive department, under the direction of the Commissioner of Labor, Jerry Chizek, added a division pursuant to the Federal Comprehensive Employment Training Act. The new division was referred to as the Comprehensive Employment Training Unit (CETA). At the time of the creation of CETA, the 1971 version of the Merit System Rules was in effect.

It was the Commissioner's desire to staff the new unit, to the extent possible, with experienced and qualified employees from other divisions of the Department of Labor or other agencies of the State of Nebraska. As a consequence, Commissioner Chizek was concerned with whether employees of other divisions of the Department of Labor or other agencies under the Merit System would lose any accrued benefits or seniority by transferring to the new unit. The Commissioner testified that if the employees lost any benefits or seniority, it would be difficult, if not impossible, to convince any of them to transfer to the new unit. The Commissioner of Labor, personally and by directing his subordinates so to do, advised the Plaintiffs that they would not lose any seniority rights or benefits by transferring into CETA.

There was a letter from the Merit System Director to the Personnel Officer of the Division of Employment of the Department of Labor dated May 22, 1974, reciting the Merit System Director's opinion of the rights of transferred employees. The letter is not clear, is contradictory, and the author is deceased. Neither the Commissioner of

Labor, those whom he assigned to research the seniority issue, nor the Plaintiffs ever received a copy of this letter.

At the time of the creation of CETA, Plaintiffs Polk, Gettemy, and Baudler were each advised by the Commissioner of Labor (or his subordinate at the Commissioner's direction) that their seniority rights were protected by the Merit System Rules. Each relied upon that representation when they agreed to accept proposed transfer from other divisions of the Department of Labor. The Circuit Court admitted

> ". . . the Merit System's Rules do not provide a model for clarity and do admit of some ambiguity . . ." Page 13, App. 14a.

The District Court found that these representations made by the agency head were sufficient to create a reasonable expectation on the part of the employees and thus a property interest in seniority rights earned prior to transfer to CETA.

Gloria Smith transferred to CETA from the Division of Employment of the Department of Labor sometime later going through a similar set of circumstances. The Director of CETA represented to her that she would not lose any seniority rights or benefits by transferring to CETA. At the time of her transfer, Mrs. Smith had conversations with James Eddington, the author of the May 22, 1974 letter, in which he indicated that her seniority rights would be retained upon transfer. In 1978, Commissioner Chizek was replaced with John Hanlon.

In the Spring of 1981, Commissioner Hanlon instructed the Director of each of the divisions of the Department

of Labor to develop reduction-in-force guidelines (RIF Guidelines). William Loder, the new Director of CETA, prepared reduction-in-force guidelines for CETA which restricted seniority points to those earned only while employed within CETA. The guidelines were issued to the employees of CETA and Ron Sorensen, then Director of the Merit System, (two years later Sorensen was appointed the Commissioner of Labor). Sorensen did not take any action to approve the guidelines or to make any final determination that the guidelines were in compliance with the Merit System Rules. Sorensen testified that he personally held the view that the RIF Guidelines complied with the Merit System Rules and his Chief Deputy held the view that the RIF Guidelines did not comply with the Merit System Rules on the issue of what seniority points were to be counted. A formal opinion or decision has never been issued by the Department to this date.

The Plaintiffs were notified they were being laid off. They were not permitted to apply seniority rights earned while employed in other Merit System agencies of the Department of Labor. Smith, Polk, and Gettemy filed this action in Federal District Court alleging that the State had deprived them of their property without just compensation and in violation of the Due Process Clause of the Fifth and Fourteenth Amendments and in violation of the Contract Clause of Article I, § 10 of the United States Constitution. A temporary injunction was issued by the District Court. The layoff was suspended. In late November of 1981, the layoff was reinstituted. At that time, Baudler filed his action and secured a temporary injunction barring his termination.

The parties stipulated that a property interest existed in the retention points. The District Court found that the denial of the seniority rights earned in other agencies was a deprivation of property without compensation, without due process and a violation of the Contract Clause of the United States Constitution. The District Court issued an injunction prohibiting the termination of the Plaintiffs under the terms of the RIF Guidelines and awarded the Plaintiffs attorney fees under 42 U.S.C. § 1988 as the prevailing party.

The Circuit Court reversed on the basis that the representations of the Commissioner of Labor to the Plaintiffs were unauthorized under *federal* law; that *federal* standards of construction of the employment contracts should be applied rather than state standards; and that, using these federal standards of construction, the RIF Guidelines were a reasonable interpretation of the employment contracts.

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## REASONS FOR GRANTING THE WRIT

### I.

### Federal Courts Are Bound, Under The Constitution And Previous Decisions Of This Court, To Apply State Law In Determining The Contract And Property Interests Of The Plaintiffs.

Certiorari should be granted in these consolidated cases because the Eighth Circuit did not apply state law in determining contract and property interests of persons employed by the State of Nebraska. *Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198, 76 S.Ct. 273 (1956). Rather, the Circuit Court has determined these interests

by imposing its own interpretation upon the rules and regulations governing Plaintiffs' employment. If certiorari is not granted, this case becomes precedence for the proposition that federal courts should rely upon federal sources, not state sources, to determine contract construction standards. This would be contrary to the long-established doctrines of this Court in *Erie R. Co. v. Thompkins,* 304 U.S. 64, 58 S.Ct. 817 (1938) and *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694 (1972).

The power of the Federal judiciary is limited to that granted by the United States Constitution. *United States Constitution,* Art. III, § 2. All powers which are not specifically delegated to the United States nor prohibited to the States by the Constitution are reserved to the States or the people under the Tenth Amendment. The Eighth Circuit's decision in this case drastically modifies this Court's previous applications of Article III, § 2 and the Tenth Amendment to the United States Constitution.

Federal Courts are bound to apply state law except in matters governed by the Federal Constitution or by acts of Congress. *Erie R. Co. v. Thompkins, supra.* The state law to be applied includes both state statutes and the decisions of the highest court of a state. *Id.* at 78, 58 S.Ct. at 822. Federal Courts are not common law tribunals. *United States v. Hudson & Goodwin,* 11 U.S. 32, (1812). Federal courts have no choice, therefore, but to apply state law in areas controlled by the common law, *Id.; Erie R. Co. v. Thompkins, supra,* such as property and contract interests. *Fernandes v. Wiener,* 326 U.S. 340, 66 S.Ct. 178 (1945); *Bishop v. Woods,* 426 U.S. 341, 344 n. 6, 96 S.Ct. 2074, 2077 (1976); *Board of Regents v. Roth,* 408

U.S. 564, 577, 92 S. Ct. 2701 (1972); *Perry v. Sindermann, supra* at 603 n.7, 92 S.Ct. at 2700.

## II.

### The Eighth Circuit Referred In Its Decision To Federal Interpretive Doctrines On Points The Tenth Amendment Requires To Be Decided On The Basis Of State Law.

The Eighth Circuit Opinion reflects a complete failure to apply Nebraska law to the determination of property and contract interests. Moreover, there is a total failure to give any weight to the district judge's application of Nebraska law. Such failures are radical departures from previous holdings and violate constitutional principles concerning the inter-relationship of state and federal courts. These issues are so basic to our American system of justice, and the precedential nature of the case is of such magnitude, that review by the United States Supreme Court is vitally important. *West v. American Telephone & Telegraph Company,* 311 U.S. 223, 235, 61 S.Ct. 179, 182 (1940); *Bernhardt v. Polygraphic Co. of America, supra* at 200 and 204, 76 S.Ct. at 274 and 277.

### A. The Eighth Circuit Refused To Consider Plaintiffs' Reasonable Expectations As Required By Nebraska Law.

In interpreting the terms of Plaintiffs' employment contracts, the Eighth Circuit refused to consider the Plaintiffs' reasonable expectations fostered by the Defendants. The following assertions are contrary to Nebraska law and are supported only by reference to federal cases construing federal regulations: "[T]he testimony in the district court regarding representations made to

the Appellees by their superiors at the times they transferred to CETA need not further concern us.[2]" Footnote 2 refers only to federal decisions of interpretation and authority of federal governmental officers. (Opinion p. 8, App. 8a). "That the employees may *reasonably have thought* that their superiors had authority to give assurances of transferred seniority rights does not affect our conclusion that the Merit System Rules alone govern." (Opinion p. 8 n.2, App. 9a) (emphasis supplied). No Nebraska law is cited as the basis for this conclusion. The Eighth Circuit admitted "the Merit System Rules do not provide a model for clarity and do admit of some ambiguity . . ." (Opinion p. 13 App. 14a), but concluded the actions of the government officers were reasonable rather than examine the reasonableness of the employees' expectations as required by Nebraska law.

The law with regard to employment contracts with the State of Nebraska is not, and never has been, as expressed by the Eighth Circuit in the above-quoted language. The controlling case in Nebraska is *Halpin v. Nebraska State Patrolmen's Retirement System,* 211 Neb. 892, 320 N.W.2d 910 (1982); cited by the Eighth Circuit as *contrary* to their decision. (Opinion p. 17 App. 19a). *Halpin* involved interpretation of NEB. REV. STAT. § 60-452.01 regarding calculation of retirement benefits. The litigation arose over the change in calculating these benefits due to a 1978 Attorney General's opinion construing the statute. The Attorney General's opinion concluded the method used was not proper under the law. The Retirement Board thereafter changed the method to conform with the Attorney General's opinion. *Id.* at 894-895, 320 N.W.2d at 912. The Nebraska Supreme Court looked

outside the express provisions of the pension law and examined the representations made to the patrolmen by the Retirement Board. *Id.* at 898-899, 320 N.W.2d at 914. The Court held the State was bound by these representations and the Patrolmen were entitled to pension calculated according to the original method because the representations produced in the patrolmen " 'reasonable expectations which are protected by the law of contracts.' " *Id.*

The Plaintiffs in the case at bar had been advised prior to their transfer they would retain all seniority previously earned. These representations continued for several years after the Plaintiffs' transfer. The Plaintiffs relied upon this advice and it constituted an incentive for them to transfer to, and remain in the employment of, CETA. Under Nebraska law, representations from Plaintiffs' superiors at the time of transferring to CETA, upon which Plaintiffs rely, determine the terms of their employment contracts. *Id.* at 899, 320 N.W.2d at 914.

The Eighth Circuit Court of Appeals acknowledged *Halpin v. Nebraska State Patrolmen's Retirement System,* and refused to follow the state law established therein. (Opinion p. 17, App. 19a). This rejection of state law by the Circuit Court of Appeals in an area controlled by common law is prohibited by the Tenth Amendment to the United States Constitution and contrary to a long line of decisions established by the Supreme Court of the United States. *Erie R. Co. v. Thompkins, supra; Perry v. Sinderman, supra.*

The decision in *Halpin v. Nebraska State Patrolmen's Retirement System, supra,* is not an isolated case in the common law of Nebraska with regard to interpretation of

contracts. See also, *Roth v. Lieske,* 189 Neb. 216, 201 N.W.2d 846 (1972); and *Van Dorn Ironworks Co. v. State,* 76 Neb. 713, 107 N.W. 856 (1906); *Follmer v. State,* 94 Neb. 217, 142 N.W. 908 (1913). See also, *Drinkwine v. Flebbe,* 219 Neb. 291, — N.W.2d — (February 15, 1985); *Serafin v. Lexington,* 547 F. Supp. 1118, 1123 (Neb. 1982) (Schatz, J.); *Nevels v. Hanlon,* 646 F.2d 372, 375 (8th Cir. 1981); *Johnson v. Angle,* 341 F. Supp. 1043, 1052-1053 (D.C. Neb. 1971) (Van Pelt, J.).

### B. The Court Used Federal Rules For Interpretation Of Regulations Rather Than State Rules.

It is state law which must be used to determine the property or contract interests in this case. The Circuit Court looked to the Merit System Rules as constituting the contract from whence the property interest flowed. However, rather than apply Nebraska contract law to those Rules to determine Plaintiffs' rights, the Circuit Court referenced only decisions of federal courts interpreting federal regulations. (Opinion pp. 8-9, App. 9a-10a). The only case cited by the Circuit Court which dealt with state law interpretation was one in which the Eighth Circuit applied Missouri rules of statutory construction to a Missouri statute. *Hughes v. Whitmer,* 714 F.2d 1407, 1415 (8th Cir. 1983) (Opinion p. 8, App. 9a). *None* of the propositions propounded by the Eighth Circuit is supported by Nebraska law.

The premise of the Circuit Court's decision is that an agency's interpretation of its own rules should be given deference when construing rights of the parties. Even though there are several Nebraska Supreme Court decisions on the issue, the Eighth Circuit did not refer to any

of them. The cases cited involved interpretation by federal courts of federal regulations.

Nebraska does not recognize deferential treatment to an agency's interpretation of its own rules where the rules constitute an employment contract. *Drinkwine v. Flebbe, supra. Halpin v. Nebraska State Patrolmen's Retirement System, supra. Drinkwine, supra,* was decided after the Circuit Court decided this case, but it expresses a consistent view:

> "It cannot reasonably be said that the state can allow one of its agencies to enter a contract and allow another agency reviewing disputes arising out of that contract to ignore it . . ." *Id.* at 294, — N.W.2d at —.

### C. The Eighth Circuit Ignored The Authority Of The Commissioner Of Labor.

Nebraska law gives the Commissioner of Labor authority to apply the Merit System Rules to the Plaintiffs. Without reference to Nebraska law, however, the Eighth Circuit determined the Commissioner to be without such authority. (Opinion pp. 7-8, App. 8a).

Article IV, § 1 of the Nebraska Constitution provides that the "heads of the various executive or civil departments shall have power to appoint and remove all subordinate employees in their respective departments." The Nebraska Department of Labor is designated as an executive department (NEB. REV. STAT. § 81-101) and the Commissioner of Labor is designated as the department head for the Department of Labor (NEB. REV. STAT. § 81-102). In general, the Commissioner of Labor has the authority to prescribe regulations for the government of his department and the conduct of his employees and to organize and administer the department and the employees in the department. See NEB. REV. STAT. §§ 81-112, 48-605, and 48-606. The Commissioner is given the authority to:

> "appoint, fix the compensation . . . prescribe the duties and powers . . . establish minimum personnel standards . . . establish and enforce fair and reasonable regulations for appointments, promotions, and demotions based upon ratings of efficiency and fitness and for terminations for cause." NEB. REV. STAT. § 48-609.

This grant of authority covers the Commissioner's supervision of the Comprehensive Employment and Training Unit. NEB. REV. STAT. §§ 48-609 and 48-616. The Nebraska Merit System Act grants to the Commissioner the ability to appoint employees by transfer from other agencies upon terms which the Commissioner establishes. NEB. REV. STAT. § 81-898. Both the trial court and the Court of Appeals concluded that the Comprehensive Employment Training Unit was a separate agency and the Commissioner of Labor was the agency head.

The Commissioner of Labor had statutory authority to make the representations upon which the Plaintiffs relied. Such representations by the Commissioner of Labor are binding on the State of Nebraska and constitute enforceable terms of contracts with the State. *Follmer v. State, supra, Roth v. Lieske, supra, Halpin v. State Patrol Retirement System, supra.* The Merit System and its Director may not ignore the agreement between the Commissioner and the Plaintiffs. *Drinkwine v. Flebbe, supra.* The Merit System Director has no authority to establish terms of employment or render binding opinions on construction of the Merit System Rules. NEB. REV. STAT. §§ 81-894, 81-895, 81-896 and 81-8,100. The agency head, i.e. Commissioner of Labor, has always been the ultimate authority in deciding how the Merit System Rules are inter-

preted and applied to CETA employees. Merit System Rule 13(9) (1978) and Rule Article XIII § 4 (1971). (App. 99a—App. 100a).

It is the Commissioner of Labor who has the authority to establish the terms and conditions of employment for employees of the Comprehensive Employment and Training Unit; not the Merit System Director. Nebraska recognizes a contract of employment in public employment to be made up of the by-laws, policies and practices and representations of the employer. *Brady v. Bd. of Trustees of Neb. State Colleges,* 196 Neb. 226, 228, 242 N.W.2d 616, 619 (1976).

### D. The Eighth Circuit Failed To Apply The Law In Existence At The Time Of The Transfer.

Even though the Circuit Court recognized that rules in existence at the time of transfer of Plaintiffs Gettemy, Polk, and Baudler (1971 Rules) suggest a result contrary to that reached by the Circuit Court, it refused to follow them:

> "However, in the *controlling 1978 Rules,* . . ., the explicit reference to 'original appointments' is dropped, thereby substantially weakening the force of this suggestion." (Emphasis supplied). (Opinion p. 12, App. 14a).

Application of the 1978 Rules to substantive rights of these Plaintiffs is contrary to Nebraska law. The Eighth Circuit cited no authority to support its assertion that these 1978 Rules control substantive rights.

This conclusion reveals again, not only a failure, but a blatant refusal to rest the decision on state law. Each of these employees transferred to CETA prior to the Adoption of the 1978 Rules. Nebraska law squarely holds that the law in effect at the time of the commencement of

a contract with the State becomes a part of the contract. *Halpin v. Nebraska State Patrolmen's Retirement System, supra; Pfeifer v. Ableidinger,* 166 Neb. 464, 481, 89 N.W.2d 568, 578 (1958); *Todd v. Bd. of Educ. Lands and Funds,* 154 Neb. 606, 610, 48 N.W.2d 706, 710 (1951).

Nebraska law uniformly holds that following the execution of a contract with the state, the state may not modify the substantive terms of the contract through legislation (*Stoller v. State,* 171 Neb. 93, 103-104, 105 N.W.2d 852, 858 (1960); *Todd v. Bd. of Educ. Lands and Funds, supra* at 610) or through interpretation of statutes or rules (*Halpin v. State Patrolmen's Retirement System, supra* at 902, 320 N.W.2d at 916; *Drinkwine v. Flebbe, supra.*).

Nebraska law requires the conclusion that the 1978 Merit System Rules were not the controlling Rules. Reference to Nebraska state law rather than federal law would have produced a decision consistent with the District Court.

## CONCLUSION

The Eighth Circuit has substituted its own judgment of what Nebraska law *ought* to be for what it is. The Court has gone so far as to cite Nebraska law as *contra* to its opinion. (Opinion p. 17, App. 19a). Federal Courts ignoring State common law was a problem that was discussed and expressly forbidden under *Erie R. Co. v. Thompkins, supra.* Quoting from the dissenting opinion of Mr. Justice Field in the case of *Baltimore & Ohio R.R. Co. v. Baugh,* 149 U.S. 368, 401, 13 S.Ct. 914, 927 (1893), the Court stated:

> "The Common law so far as it is enforced in a state, whether called common law or not, is not the common

> law generally but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else.
>
> . . .
>
> "The authority and *the only authority* is the state and if that be so, the voice adopted by the state as its own [whether it be of its legislature or of its Supreme Court] should utter the last word." *Erie R. Co. v. Thompkins, supra* at 78-79, 58 S.Ct. at 822-823. (Emphasis supplied).

The Eighth Circuit Court of Appeals has rejected this holding in *Erie R. Co. v. Thompkins* in favor of the view that general rules of construction favored by a federal judge ought to be used to determine the law of a state. By refusing to apply Nebraska law to interpret contract terms, the Eighth Circuit Court of Appeals has violated the constitutional principles found in Article III, § 2 and the Tenth Amendment of the United States Constitution. By its blatant rejection of state law, the opinion stands as a rejection of the doctrine of *Erie R. Co. v. Thompkins, supra.* The Circuit Court opinion constitutes an invitation to other courts to follow its lead and infringe upon rights reserved to the states by the Tenth Amendment. This case, and those that would follow, are an erosion of basic constitutional principles, the maintenance of which are necessary to our constitutional form of government.

Respectfully submitted,

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**EXHIBIT A**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal from the United States District Court
for the District of Nebraska

No. 83-2136

Gloria R. Smith,

Appellee,

v.

Ronald E. Sorensen, Commissioner of Labor, Department of Labor, State of Nebraska; William R. Loder, Director, Comprehensive Employment & Training Unit, Department of Labor, State of Nebraska; Department of Labor, State of Nebraska; Director of the Merit System of the State of Nebraska; and State of Nebraska,

Appellants.

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No. 83-2138

---

Richard Gettemy and Donna Polk,

Appellees,

v.

Ronald E. Sorensen, et al.,

Appellants.

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No. 83-2139

---

James L. Baudler,

Appellee,

v.

Ronald E. Sorensen, et al.,

Appellants.

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Submitted: April 10, 1984
Filed: November 5, 1984

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Before LAY, Chief Judge, McMILLIAN and JOHN R. GIBSON, Circuit Judges.

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JOHN R. GIBSON, Circuit Judge.

Gloria R. Smith, Richard Gettemy, Donna Polk and James L. Baudler, employees of the Comprehensive Employment Training Unit (CETA), a division within the Nebraska Department of Labor, were notified that they were to be laid off. They were so selected because a reduction in force guideline limited consideration of their seniority only to time with CETA instead of the entirety of their employment with the Department and also similarly limited their "bumping rights." They brought suit against Ronald Sorensen, Commissioner of Labor, State of Nebraska; William R. Loder, Director, Comprehensive Employment & Training Unit; the Department of Labor, State of Nebraska; the Director of the Merit System of the State of Nebraska; and the State of Nebraska under 42 U.S.C. § 1983 (1982) claiming that because of the limitation of their seniority rights there was a deprivation of due process of law in the attempted layoffs and an impermissible impairment of their employment contracts by

the state and its officials. The district court, after issuing preliminary injunctions restraining the layoffs, entered orders determining that all plaintiffs were entitled to retention points based on their total service with the Department of Labor instead of CETA service alone. It further determined bumping rights and awarded attorneys' fees. The district court also found that Baudler was included in the layoff in part because he was a Democrat during a Republican administration. The state, its departments, and its officers appeal. We reverse.

Smith, Gettemy, Polk and Baudler were employed by the CETA Division of the Nebraska State Department of Labor. CETA was formed in 1974 to administer federally funded employment programs. All four employees had transferred into CETA from other positions in the Department of Labor. In 1981, Loder, the Director of CETA, decided to reorganize the Division because of anticipated decreased funding and prepared a reduction in force (RIF) guideline. After Loder sent notifications of termination to Gettemy, Smith and Polk, they filed suit, and the district court preliminarily enjoined such termination. The RIF was suspended but reinstituted by Loder in late November with respect to other employees, including Baudler. After Baudler filed suit, the court issued a temporary restraining order preventing his layoff.

In early 1981, the Commissioner of Labor of Nebraska, John Hanlon, had requested that Loder prepare guidelines for a RIF for CETA. Loder testified that the RIF was instituted not only because of an anticipated reduction in funds but also because of his desire to change the management structure of the division so that a greater proportion of the division's budget would be spent

for the delivery of programs to the recipients and less on program administration. The revised structure of CETA eliminated the positions of Gettemy, the Administrative Services Manager, and Baudler, the Planning Manager. The RIF guideline defined the order of layoff for CETA employees by using a retention point calculation based on the time of service each employee had with the Division. Commendable ratings also entitled the employees to additional points. The guideline provided for rank-ordered bumping rights to the same classification in another organizational unit or a sub-unit, or to the next lower position in the same class series.[1] In the absence of these two situations, the employee was entitled to bump to a classification previously held while continuously employed by CETA if the classification was still being used in CETA at the time of the bumping.

At trial, Smith, Gettemy, Polk and Baudler argued they were entitled to more retention points than they were awarded under the RIF guideline because they should have been given seniority for service in all divisions of the Department of Labor. Gettemy, Baudler and Polk all claimed broader bumping privileges than the state and its officials granted. Gettemy and Baudler claimed a right to bump to the Operations Manager position in CETA; Polk claimed bumping rights to a personnel officer position or to similar positions in any division of the Department of Labor or any other Merit System agency.

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[1]To "bump" is to fill a position with an employee with greater seniority at the expense of one with less seniority, so that the senior employee may avoid layoff. A "class" is defined by the Merit System rules as one or more positions functionally similar so as to require the same minimum qualifications of training and experience.

In its opinion, the district court first determined that appellees possessed a property interest in continued employment that would be protected by the fourteenth amendment. After pointing out that all agreed that the plaintiffs possessed property rights in retention points equal to those granted in the RIF guideline, the court further determined that "the reasonable interpretation of the present [Merit System] Rules entitles each of the plaintiffs to a reasonable expectation that he or she would receive retention points calculated on their entire tenure with the Department of labor." The district court also found that all the employees had transferred to CETA with assurances that they would retain their seniority. The court separately analyzed the bumping rights of Gettemy, Baudler and Polk, finding that Gettemy had a right to bump to the Operations Manager position in CETA and, eventually, that Polk had a right to bump to a Personnel Officer II position in CETA. The district court also found that Baudler was included in the layoff in part because of his political affiliation and that an inclusion so motivated constituted a deprivation of a protected right.

The district court then concluded that the employees had been deprived of these rights without due process of law. It rejected the argument that adequate due process was available through the Merit System rules, which provided for appeal to the Merit Council and a resulting recommendation to the appointing authority. It concluded:

> The role of the Merit Council is advisory only; the appointing authority—in this case the CETA Division of the Department of Labor—remained the ultimate judge of the propriety of its decision. There is no neutral arbiter able to make a decision that is bind-

ing on the CETA Division. This is not to say that Merit System Rule 13(9) is violative of due process; it is only to say that the appeal process of that Rule does not provide a process adequate in itself to constitute a sufficient substitute for an effective pretermination process.

The district court next found that the 1978 Merit System rules created express contracts of employment. It determined that the defendants had impermissibly impaired such contracts in their improper calculation of retention points, denial of bumping rights to Gettemy and Polk, and political discrimination against Baudler.

The district court further found that Baudler had no claim under the first amendment to be free from inclusion in the layoff because of his political affiliation. It held that under the test of *Elrod v. Burns,* 427 U.S. 347 (1976), Baudler was in a policymaking position, one not constitutionally protected from patronage-based decisions.

The district court finally concluded that it need not give great weight to the interpretation of the rules by the Merit System. It then proceeded to spell out the extent of relief for each of the individuals. All were declared entitled to retention points based on their total length of service with the Department of Labor. Their bumping rights were limited to positions within CETA and not to positions in other divisions of the Department of Labor or elsewhere in the state government. Gettemy was declared entitled to injunctive measures to insure that he was considered to have held the Operations Manager position. Baudler was entitled to a declaration that his inclusion in the layoff was affected by his political affiliation. He was entitled to bump to a Planning Specialist position without reduction of pay, since that otherwise would penalize

him because of his political affiliation. Polk was eventually found to be entitled to bump to a Personnel Officer II position in CETA. The district court awarded Baudler, Polk and Gettemy attorneys' fees of $29,930.25 and costs and expenses of $852.97. Smith was awarded attorneys' fees, costs and expenses of $29,593.21.

The state, its departments, and its officers have appealed, arguing that the court erred in each of its conclusions supporting the judgment. Baudler has not appealed from the adverse ruling on his first amendment claim.

I.

The state and its officers argue that the district court erred in declaring that the employees were entitled to have their retention points calculated upon their total time of service with the Department of Labor as opposed to that with CETA. The district court based its determination upon its interpretation of the Merit System rules. It properly looked to such rules in determining the extent of the employees' property interests, since such interests are created by, and their dimensions and sufficiency are judged by, "state law—rules * * * that secure certain benefits and * * * support claims of entitlement." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972); *see Bishop v. Wood,* 426 U.S. 341 (1976). In Nebraska, such state law holds that a property interest may arise for a state public employee from the rules and regulations which have become a part of his employment contract. *Weeks v. State Board of Education,* 204 Neb. 659, 663, 284 N.W.2d 843, 846 (1979).

Since the rules were promulgated under the authority of Nebraska's Administrative Procedures Act, Neb. Rev.

Stat. §§ 84-901-919 (1981), they are as binding as if they were statutes. *Douglas County Welfare Administration v. Parks,* 204 Neb. 570, 284 N.W.2d 10 (1979). The district court correctly found that the Merit System rules so promulgated constituted an express contract between the state and the employees. *See United States Trust Co. v. New Jersey,* 431 U.S. 1, 17 (1977) (a statute is treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the state). The provisions of contracts so arising from and so authorized by law cannot be waived by officers of the state beyond the express authority given them. *In re Roadmix Construction Corp.,* 143 Neb. 425, 432, 9 N.W.2d 741 (1943); *City of Plattsmouth v. Murphy,* 74 Neb. 749, 752, 105 N.W. 293 (1905). Such unauthorized assurances are void and unenforceable and therefore insufficient to support a claim of entitlement to government employment. *Bollow v. Federal Reserve Bank,* 650 F.2d 1093, 1099 (9th Cir. 1981), *cert. denied,* 455 U.S. 948 (1982). Thus, the testimony in the district court regarding representations made to the appellees by their superiors at the times they transferred to CETA need not further concern us.[2]

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[2]It is true that in *Perry v. Sinderman,* 408 U.S. 593 (1972), the Court stated that a "legitimate claim of entitlement to continued employment" might be justified by "the existence of rules and understandings, promulgated and fostered by state employees." *Id.* at 602. Such unwritten understandings, however, were viewed as supplementing explicit contractual provisions in the absence of other explicit provisions. *Id.* Since the Merit System rules expressly state terms of employment, no room is left in the instant case for implied contractual agreements. Further, the district court made it clear in its opinion that it was relying on the rules but looking to the statements

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The question whether the Merit System rules were properly applied involves interpretation of the rules and is a question of law. Because parties have an equal right to have questions of state law reviewed on appeal, we are not bound by the district court's interpretation or to a clearly erroneous standard of review. *Hughes v. Whitmer*, 714 F.2d 1407, 1415 (8th Cir. 1983) (citing *Luke v. American Family Mutual Insurance Co.*, 476 F.2d 1015, 1019 n. 6 (8th Cir. 1972)), *cert. denied*, 104 S. Ct. 1275 (1984). We first observe that the RIF guideline was drawn by the CETA Personnel Officer. He testified that he based his calculation of retention points on CETA service alone because of his reading of the Merit System rules and his conversations with the Merit System offices. There was also testimony that this interpretation of the rules by CETA was adopted by the Merit System. The CETA RIF guideline was a restatement of Merit System Rule 12 and the interpretation given to it by the agency responsible for it. The district court specifically declined to give weight to the Merit System's interpretation. The Supreme Court has held, however, that when a case "involves an interpretation of an administrative

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of various supervisors to bolster its interpretation. That the employees may reasonably have thought that their superiors had authority to give assurances of transferred seniority rights does not affect our conclusion that the Merit System rules alone govern. It is well established that anyone who deals with the government assumes the risk that the agent acting in the government's behalf has exceeded the bounds of his authority. *See, e.g., Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *Bollow*, 650 F.2d at 1100; *Lavin v. Marsh*, 644 F.2d 1378, 1383 (9th Cir. 1981); *Gray v. Johnson*, 395 F.2d 533, 537 (10th Cir.), *cert. denied*, 392 U.S. 906 (1968).

regulation a court must *necessarily* look to the administrative construction of the regulation if the meaning of the words used is in doubt." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945) (emphasis added). We have held that an agency's interpretation of its own regulations should be given "significant weight," *Builders Steel Co. v. Marshall*, 575 F.2d 663 (8th Cir. 1978), and that, although a question of law, such interpretation should be accorded "great deference." *Murphy Oil Corp. v. Federal Energy Regulatory Commission*, 589 F.2d 944, 948 (8th Cir. 1978).

In construing the present Merit System rules, the district court began by looking to earlier versions of the rules. The 1971 Merit System rules provided:

> 3. To the average service rating, add one point for each month of seniority as defined below, and for each month of active military service of the United States, which occurs as a break in the employee's continuous service with the service with the agency. * * * (For employees of the Division of Employment this service shall include service within the State of Nebraska with the National Re-employment Service, Division of Placement and Unemployment Insurance, Nebraska State Employment Service, United States Employment Service, War Manpower Commission, and Division of Employment Security.)
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> 4. For an employee who has not had a break in service, seniority shall mean the total months of continuous service. For seniority purposes an employee who has been rehired after an involuntary break shall be given credit for all months actually on duty, plus active military service, as defined above. An employee who has been rehired after a voluntary break in service shall be given credit for all months of serv-

> ice from the date of reemployment. An employee shall be considered to have had a voluntary break in service when he separates himself from the agency at any time prior to receiving a written notice from the appointing authority stating that his job has been abolished or his services are terminated. The employee's total years of service with the Joint Merit System agencies shall be used rather than length of service in his present classification.

Article XII, § 4, ¶ (2) (c) (3) and (4). The district court stated that Article XII, § 4, ¶ (2) (c) (4) of the 1971 Rules provided that retention points were to be "based on 'the employee's total years of service with Joint Merit System agencies,'" as opposed to years of service with *an* agency.

We believe that this single sentence relied on by the district court must be read in the context of the rest of the paragraph of which it is a part, (2) (c) (4), the preceding paragraph (2) (c) (3), and the evident interrelationship of the two. Paragraph (2) (c) (4) bases seniority on "continuous service." While the term was not defined in the definitional section of the rules, paragraph (2) (c) (3), dealing with the calculation of seniority points for military service, referred to "continuous service with *the* agency," (emphasis added) that is, service within a particular Merit System agency. The second sentence in paragraph (2) (c) (4) in referring to military service also specifically referred to the definition in preceding paragraph (2) (c) (3). Further, in discussing a voluntary break in service, in the sentence immediately before that relied on by the district court there was specific reference to separation "from the agency."

Further, in paragraph (2) (c) (3), the rules expressly provided for service credits outside their agency for employees in the Division of Employment. If credit had been intended to be given for prior service in all Merit System agencies, there would have been no reason to establish this unique provision for the Division of Employment. When read in the full context of the two complete paragraphs, the sentence relied upon by the district court must be interpreted as referring to a limited issue: whether service is to be based on total years of service with the agencies in the sense of any one of the agencies making up the Joint Merit System, as opposed to a particular classification *within* an agency. This is a far more restricted issue and does not support the conclusion that retention points are to be based on service with *all* of the agencies.

The district court found that a letter had been written by the Merit System Director on May 22, 1974 stating that seniority rights apply only to the particular agency and do not transfer. It rejected this interpretation because of its own view of the meaning of the rules and because of the various statements made by the superiors of the employees in question. In view of our conclusions concerning the interpretation of the 1971 rules, which differ from that of the district court, we are satisfied that this interpretation should be given considerable weight.

The district court next discussed the construction to be given Rule 12(1) (c) (iii) (A) of the 1978 Rules, which was in effect at the time the RIF guideline was drawn up. The rule provides that:

> Length of service credit shall be allowed at a rate of one (1) point for each month of service. *For the purpose of computing length of service credits, the Appointing Authority shall include all continuous periods of employment between the date of original appointment and the date of layoff.* Approved leaves of absence without pay, suspensions without pay and layoffs for periods exceeding fourteen (14) calendar days shall not be counted; however, the periods of service immediately preceding and that immediately following such leaves of absence and layoffs shall be counted. An employee who is returned to duty following approved military duty shall have all periods of military service counted as continuous service. Part-time employment shall receive pro-rata service credit (emphasis added).

The term "original appointment" is not defined in the 1978 Rules. The district court reasoned that the failure to define the term indicated an intent not to change the method of calculating retention ponts. We agree that there was no intent to change the method of calculation. Because we have found the earlier rules consonant with the interpretation of the RIF guideline, we find further support for our conclusion as to the meaning of the 1978 rules.

The meaning of the term "original appointment" is not self-evident; it could refer either to the time an employee started to work in a particular agency or to the time an employee was first employed in any Merit System agency. In the earlier 1975 Rules the term is defined as "the first appointment of an individual to a position," which is equally ambiguous. The 1971 Rules did distinguish the discretionary probationary period for promoted employees from the mandatory period required "for original appointments for the new position," (Art. IX, § 1,

¶ (2)) thereby suggesting "original appointment" referred to first employment in the Merit System. However, in the controlling 1978 Rules, while the mandatory and discretionary periods are retained, the explicit reference to "original appointments" is dropped, thereby substantially weakening the force of this suggestion. Rule 10(5).

Further, retention points are calculated in the Merit System on the basis of both length of service and performance evaluation. The employee's performance evaluation is retained in the employee's personnel file in the agency. Rule 14(4). Rule 18(1) (d) does not list performance evaluations among the items the Nebraska Merit System is required to keep, while Rule 18(2) (b) indicates that an agency personnel file of an employee is not available to representatives from a different agency. It seems likely that if performance evaluations from other agencies were to be used in calculating retention points, the rules would have established access to an employee's personnel files.

While the Merit System rules do not provide a model for clarity and do admit of some ambiguity, we believe a careful reading of the contested portions with care for the context in which they appear indicates that the state officers were correct in limiting the calculations of retention points to CETA employment. Accordingly, the regulations create no additional property interests upon which the employees can base a constitutional claim.

## II.

### A.

The district court found that all employees had been deprived without due process of law of property interests

in continued employment with the Department of Labor. It found such property interests stemming from denial of retention points for all four employees and from denial of bumping rights for Gettemy and Polk.

The procedures that are to be followed by agencies when an RIF occurs are established by Merit System rules 12(1)(c) and 13. Employees must be notified of the RIF formula so that all employees have access to it. Rule 12(1)(c)(iv). Each affected employee is to be given at least fourteen days notice of layoff unless budgetary constraints require otherwise. Rule 12(1)(c)(ii). An employee may then appeal to the Merit Council pursuant to Rule 12(1)(c)(viii). An appeal is provided to the Council from any agency determination that a person was not entitled to bump to a specific position. Rule 13.

The appeal procedure before the Merit Council is established by Rule 13. Rule 13(9) states:

> A permanent classified employee who is dismissed, suspended or demoted may appeal in writing to the Council within fourteen (14) calendar days of the effective date of the dismissal, suspension or demotion. Within seven (7) calendar days of the receipt of such written appeal, the Director shall provide the employee and the Appointing Authority with written notice of the hearing date. The hearing date shall be within thirty (30) calendar days following notice by the Director and subject to change upon mutual agreement of all parties concerned. The Council shall make its recommendations in writing to the Appointing Authority within fifteen (15) calendar days of the hearing date. After consideration of the Council's recommendations, the Appointing Authority shall make a decision which shall be recorded in the permanent records of the Agency. The Appointing Authority or designated representative shall

promptly give written notice to the employee and the Merit System Office of the Appointing Authority's final decision.

In addition to such appeal, employees may seek a binding declaratory ruling pursuant to Rule 20(4). A request for such a ruling must be answered within fifteen working days unless it requires a response from the Council, in which case there is to be an answer within fifteen days following the Council's next meeting. Further, under Neb. Rev. Stat. § 84-911 (1981), employees are entitled to obtain a declaratory judgment from the appropriate state district court without first pursuing the administrative relief. Under the Nebraska Administrative Procedures Act, the decision of the Commissioner of Labor is appealable to the state district court.

Given these procedures, we are faced with the question whether due process is violated, first, as the employees urge on appeal, by the failure to provide a pretermination hearing and, second, as the district court found, by the advisory role of the Merit Council in the appeal process.

In *Parratt v. Taylor*, the Supreme Court stated:

> Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests. The fundamental requirement of due process is the opportunity to be heard and it is an "opportunity which must be granted at a meaningful time and in a meaningful manner." • • • However, • • • we have rejected the proposition that "at a meaningful time and in a meaningful manner" *always* requires the State to provide a hearing prior to the initial deprivation of property. This rejection is based in part on the impracticability in some cases of providing any

> preseizure hearing under a state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available.

451 U.S. 527, 540 (1981).

On the facts of the instant case, we believe that to require hearings before the implementation of an RIF guideline would involve such impracticability. The establishment of the RIF guideline involved an interpretation of Merit System rules by state officers faced with funding shortfalls. To require a hearing on the *possibility* that such an interpretation might be incorrect would considerably burden governmental decision-making. *See Mathews v. Eldridge,* 424 U.S. 319, 335 (1976) (the government's interest, including the fiscal and administrative burden involved, is to be considered in evaluating whether procedural due process is met).

In addition, in *Arnett v. Kennedy,* 416 U.S. 134 (1974), a case involving discharge of a federal employee under the Lloyd-La Follette Act, six members of the Court held that due process was not violated by the lack of a pretermination hearing, given the discharge procedures established by the Act. We believe that the similar discharge procedures outlined above that were available to the employees after the implementation of the RIF guideline provided such protection of their rights that the absence of a pretermination hearing alone was not violative of due process.

The district court found due process was violated in that the appeal to the Merit Council described above involves only a recommendation by the Council with the appointing authority remaining "the ultimate judge of the propriety of its decision." It found that the lack of a

"neutral arbiter" made the appeal process under Rule 13(9) an inadequate substitute for a pretermination hearing. A challenge involving a similar situation was mounted in *Nevels v. Hanlon,* 656 F.2d 372 (8th Cir. 1981). Nevels argued that because the Merit System rules of Nebraska require the Commissioner of Labor to make the initial determination to dismiss an employee and then to make the final decision on any appeal, the Commissioner is predisposed to uphold his original decision and is not therefore, an impartial decisionmaker. We firmly rejected that argument. In *Withrow v. Larkin,* 421 U.S. 35 (1975), a procedure in which an administrative board both investigated and adjudicated a case was found not to violate due process. In *Nevels,* although the Commissioner technically initiated Nevels' discharge, in actuality it had been initiated by his immediate supervisors. We found that having the Commissioner review the actions of his subordinate ran far less risk of actual bias or prejudgment than the practice approved in *Withrow.* In the instant case, the initial involvement of the appointing authority consisted of approval of the RIF guideline, including its general statements regarding bumping rights. No initial decision was made as to the rights of Gettemy and Polk to bump to particular positions. In this situation we cannot say that the procedure involved "necessarily creates an unconstitutional risk of bias in administrative adjudication" or that the employees have "overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow,* 421 U.S. at 47. Therefore, we conclude that the Merit System appeal process vesting the final decision in the appointing authority is not violative of due process without a further showing of bias or prejudgment. Since no further showing was made, the employees' due process claim must be rejected.

B.

The district court also found that the denial of retention points to all employees and the denial of bumping rights to Gettemy and Polk were impermissible impairments of contracts in violation of the United States Constitution.

Article I, section 10 of the United States Constitution provides: "No State shall * * * pass any * * * Law impairing the Obligation of Contracts." In *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, the Supreme Court stated:

> In order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a *law* of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the *acts of administrative* or executive *boards or officers,* or the doings of corporations or individuals.

125 U.S. 18, 30 (1888) (emphasis added). Recent United States Supreme Court cases interpreting the contract clause have not dispensed with the necessity of establishing that the contract at issue was impaired by an act of legislative power. *See Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977). *Contra Halpin v. Nebraska State Patrolmen's Retirement System,* 211 Neb. 892, 320 N.W.2d 910 (1982). The drawing-up of the RIF guideline and the determination of Gettemy and Polk's bumping rights by state officials were administrative acts. The acts did not *change* the Merit System rules; rather, they

*applied* them to particular cases. Thus, there was no attempt on the part of the state and its officials "to use the law * * * to repudiate a contractual obligation, *Jackson Sawmill Co. v. United States,* 580 F.2d 302, 312 (8th Cir. 1978) *cert. denied,* 439 U.S. 1070 (1979), since the contested obligation stemmed from the very law in question. As in Jackson, the employees "have confused impairment of performance of a contract with impairment of the obligation of the contract. The Constitution does not provide a federal action for simple breach of contract." *Id.* Given this holding, we need not reach the issue of whether a claim under article I, section 10 is actionable under 42 U.S.C. § 1983. We conclude the state did not violate the contract clause in its drafting of the RIF guideline and its determination of Gettemy and Polk's bumping rights.[3]

III.

The district court also granted James Baudler relief on the finding that his inclusion in the layoff was affected by his political affiliation.

At the outset, we believe there is a serious question as to the sufficiency of the evidence to support the finding. The district court primarily based its finding on two conversations, one between Baudler and William Loder, CETA Director, on July 1, 1981, the other between Baudler and Daniel York, Deputy Director, on September

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[3]The employees also argue on appeal that implementation of the RIF guideline would deprive them of their property without just compensation in violation of their fifth amendment rights. As this issue was not raised at the district court level, we need not consider it. *Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976); *Ludwig v. Marion Laboratories,* 465 F.2d 114 (8th Cir. 1972).

2, 1981. Baudler testified that at the July 1 meeting Loder told him that if he were a Republican he would be one of the top persons in the organization. Loder testified that this was his way of telling Baudler he had excellent capabilities in the technical area and that such capabilities could have led to his selection as Deputy Director. Since positions above Baudler's were filled by the patronage system, we see no impropriety in Loder's remark. Baudler also testified that Loder told him he should consult a professional resume writer and that the comments were made in regard to the stress, tension, and pressures that Baudler apparently was experiencing on the job. The comments were made during a performance evaluation in which below satisfactory marks in "communication" relating to a lack of dependability and cooperation were discussed and do not appear to us to bear on Baudler's political affiliation.

Baudler also offered into evidence a diary entry indicating that on September 2, 1981 Daniel York told him that purely partisan decisions were being made regarding the reduction in force. At trial, York denied making the statement and testified that at the time he had no precise idea whom the affected individuals would be. We believe that the probative value of the diary entry, uncorroborated as it is, and filtered through the perceptions of an employee experiencing job difficulties, is weak.

The district court also found that an incident in which Commissioner John Hanlon bought a group of employees drinks and then, according to Baudler, upon being thanked by Baudler, told him, "I hope you choke on it," added credence to Baudler's claim. Hanlon did not remember making the remark. Robert Shanahan, an employee in

the group who was sitting near Hanlon and Baudler, did not remember hearing Hanlon make the remark. If the remark was made, we see no indication that it was made because of Baudler's political affiliation.

We believe the district court properly found that the other testimony Baudler offered in support of his claim, such as a statement by Loder to Baudler that a certain way of running a program was a "democratic way of doing things," a denial of a telephone credit card when the number of cards issued in the CETA Division was cut from seventy-five to five and an incident in which Commissioner Hanlon questioned Baudler's use of sick leave after Baudler had taken sick leave for a day but was then met by Hanlon in a public building, did not indicate political prejudice against Baudler.

The findings of fact of a trial court are not to be set aside unless they are clearly erroneous, and due regard is to be given to the opportunity of the trial court to judge the credibility of the witnesses. Fed. R. Civ. P. 52(a); *see Pullman-Standard v. Swint,* 456 U.S. 273, 284 n. 4 (1982); *Hoefelman v. Conservation Commission of the Missouri Department of Conservation,* 718 F.2d 281 (8th Cir. 1983). A court of appeals can declare a finding of fact clearly erroneous only if there is no substantial evidence to support it or if, upon considering the entire record, it is left with the definite and firm conviction a mistake has been made. *Id.* at 285. We believe that under this test the district court's finding might very well be judged clearly erroneous. We need not decide this issue or base our decision solely on it, however, since other considerations necessitate a reversal of the relief granted Baudler.

The district court found that Baudler could not successfully make a claim under the first amendment because *Elrod v. Burns,* 427 U.S. 347 (1976), exempts those in policymaking positions from protection under the first amendment for dismissal due to political affiliation. This determination was not appealed by Baudler. However, the district court found that Baudler had rights entitled to due process protection under the Merit System rules. Rule 1(2)(e) of the 1978 Merit System rules states that one of the principles of the system is to assure "fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation." With such rights involved, the issue is then whether Merit System procedures provided adequate protection. Rule 13(6) establishes the appeals process when such rights are involved:

> Any applicant or employee who has reason to believe that he/she has been discriminated against because of religion, political opinions, or affiliations, race, sex, national origin, age, disability, or any other non-merit factor in any personnel action including denial of transfer, may appeal to the Council. Such appeal shall be filed in writing and within ninety (90) calendar days of the alleged discrimination. The Council, or its designated representative, shall hear the appeal and give its written decision within thirty (30) calendar days. *The Council decision shall be final and binding in all cases of alleged discrimination* (emphasis added).

Since the Council's decision is binding in such instances, the issues regarding the advisory role of the Council and the lack of a "neutral arbiter" do not arise. We believe that the general appeal procedures of the Merit System we discussed above read in conjunction with Rule 13 es-

tablish that adequate due process was afforded Baudler on his political affiliation discrimination claim.

The district court also held that political discrimination against Baudler constituted an impermissible impairment of contract. The conclusion must be rejected for the reasons we have discussed above.

## IV.

The state and its officials also argue that the State of Nebraska, the Department of Labor, and the Joint Merit System were immune from suit under the eleventh amendment. Given our conclusions above, we need not reach this issue.

This case underscores the statement in *Bishop v. Wood,* 426 U.S. 341, 349 (1976): "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." We reverse the district court's declaration that retention points for the employees were to be calculated to reflect their total length of service with the Department of Labor, its conclusions that the employees' due process and impairment of contract rights were violated, and its issuance of injunctive relief to prevent any reduction in Baudler's salary because of his political affiliation. The district court's findings that Gettemy was entitled to be considered to have held the Operations Manager position, Polk a Personnel Officer II position, and Baudler a Planning Specialist position were not specifically raised on appeal. Nonetheless, since they were relief for claims we have found not to be cognizable under section 1983, they also must be reversed.

We reverse the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

**EXHIBIT B**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
JUDGMENT

September Term, 1983

CV81-L-273
CV81-L-275
CV81-L-359

No. 83-2136/38/39NE

Gloria Smith, et al,

Appellees,

vs.

Ronald E. Sorensen, etc., et al,

Appellants.

Appeal from the United States
District Court for the
District of Nebraska

(Filed Dec. 24, 1984)

This appeal from the United States District Court was submitted on the record of the said District Court and briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, reversed in accordance with the opinion of this Court.

November 5, 1984

(See attached sheet for cost info.)

A true copy.

ATTEST: Robert D. St. Vrain

Clerk, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT
12/18/84

Taxable Costs In Case Nos. 83-2136, 83-2138 and 83-2139:

Costs taxed in favor of appellants:

| | |
|---|---|
| Clerk's Docket Fee in No. 83-2136: | $ 65.00 |
| Clerk's Docket Fee in No. 83-2138: | $ 65.00 |
| Clerk's Docket Fee in No. 83-2139: | $ 65.00 |
| Costs of Designated Record: | $ 36.99 |
| Costs of Appellants' Main Brief: | $ 32.40 |
| Costs of Appellants' Reply Brief: | $ 37.80 |
| Total Costs of Appellant for Recovery from Appellee: | $ 302.19 |

**EXHIBIT C**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV81-L-273

GLORIA R. SMITH,

Plaintiff,

vs.

JOHN HANLON, Commissioner of Labor, Department of Labor, State of Nebraska; WILLIAM R. LODER, Director, Comprehensive Employment and Training Unit, Department of Labor, State of Nebraska; DEPARTMENT OF LABOR, State of Nebraska; and the STATE OF NEBRASKA,

Defendants.

CV81-L-275

RICHARD GETTEMY and DONNA POLK,

Plaintiffs,

vs.

JOHN HANLON, Commissioner of Labor, Department of Labor, State of Nebraska; WILLIAM R. LODER, Director, Comprehensive Employment and Training Unit, Department of Labor, State of Nebraska; DIRECTOR OF THE MERIT SYSTEM OF THE STATE OF NEBRASKA; and the STATE OF NEBRASKA,

Defendants,

CV81-L-359

JAMES L. BAUDLER,

Plaintiff,

vs.

JOHN HANLON, Commissioner of Labor, Department of Labor, State of Nebraska; WILLIAM R. LODER, Director, Comprehensive Employment and Training Unit, Department of Labor, State of Nebraska; DIRECTOR OF THE MERIT SYSTEM OF THE STATE OF NEBRASKA; and the STATE OF NEBRASKA,

Defendants.

MEMORANDUM OF DECISION

(Filed Dec. 17, 1982)

This consolidated case involves the propriety of certain layoffs in the Department of Labor of the State of Nebraska. The plaintiffs challenge the attempted layoffs as a redressable violation of their civil rights under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).

I.

The facts of this case involve a great number of happenings over several years. At the present time each of the plaintiffs is employed by the CETA Division of the Nebraska State Department of Labor. It will be helpful in putting the plaintiffs' employment into perspective to review the organization of the Department of Labor of the State of Nebraska.

A.

As it presently stands, the Department of Labor is organized into four departments or divisions—Safety, Employment, Governor's Special Grants, and CETA. A number of years ago, the Department of Labor consisted of only two divisions—Safety and Employment. The Safety Division was devoted to the enforcement of workplace safety standards and laws; the Employment Division was

established during the 1930s to administer programs directed toward unemployed workers. At some later time a third division—the Cooperative Area Manpower Planning System (CAMPS)—was formed to administer various employment programs funded by the federal government, CAMPS, or Manpower Planning, was later transformed into CETA Division, when federal legislation established the new program. CETA's geographic situs of service does not include Omaha or Lincoln, because those cities have their own CETA programs. The Governor's Special Grants Division was established to handle federal grants that are channeled through the governor's office.

When CETA was formed in 1974, a paramount concern of the then Commissioner of Labor, Gerald Chezik, was to have qualified personnel to staff the division. In an effort to ensure that he was able to recruit such people, Chezik made inquiries as to whether transferees would retain seniority rights obtained in other divisions of the Department of Labor. Chezik testified that he felt it was an essential part of the establishment of CETA to be able to ensure prospective employees that not only could they retain their seniority rights, but that they could freely transfer back to their old division, if they did not wish to remain with CETA. It appears from Chezik's testimony that such representations were made to prospective CETA employees, after some discussions between Chezik and his staff.

B.

The organization of the CETA Division, when the plaintiffs were first employed in it, differed from its present structure. The bulk of the division was encom-

passed by three functionally defined subunits—planning, operations, and administrative services. The planning subunit was responsible for developing plans for the programs to be administered by the agency, while the operations subunit's efforts were directed at implementing the plans for the programs. The administrative services subunit was a service bureau for the other subunits and provided procurement, fiscal services, and management information services. George Sappingfield was the operations manager until November 1978. After he resigned, Richard Gettemy and James Baudler handled the responsibilities, until Daniel York assumed the position for some period of time. York was later appointed deputy director, again leaving vacant the operations manager position.

When the defendant William R. Loder became CETA director, Baudler was the planning manager and Gettemy was the administrative services manager. The position of operations manager was vacant and Gettemy and Baudler were jointly handling the functions of that position. Gary Targoff became the operations manager on August 1, 1980. Targoff and Gettemy shared information from June 24 until August 1, while in a transition period. Gettemy did not train Targoff during this period but only shared information on an as-needed basis.

In 1980 Loder decided to reorganize the division, in response to prospects of decreased funding of the programs due to budget cutbacks. Along with a reduction in force (RIF), Loder changed the organization of the division. He developed a proposal and submitted it to the director of the Merit System, Ronald Sorenson, at about the same time that he implemented the RIF. The positions of administrative services manager and planning

manager were eliminated and the management of the CETA Division functions was placed largely under the operations manager and the deputy director of CETA; the planning functions were placed under the operations manager, and the administrative services functions were placed under the deputy director.

Loder initially sent out notifications to the plaintiffs on September 4, 1981, that they would be terminated. Gettemy, Smith and Polk filed suit in this court to enjoin the RIF, as a result of which it was suspended. Loder again sought to implement the RIF on December 1, 1981, with notification made sometime before that. Baudler filed suit to prevent the implementation of the RIF as to him. The defendants were enjoined, but proceeded with the RIF as to other employees who are not plaintiffs in the cases here.

At trial the necessity of the reorganization and its attendant RIF were challenged by Gettemy. At the time of the proposed reduction Gettemy was in charge of the analysis for CETA funds. His testimony attempting to demonstrate the nonnecessity of the RIF was far from clear, especially in the explanation of computations supposedly demonstrating the lack of need for the RIF. The apparent gist of what he said is that there was adequate funding to handle the employment of 64 full-time equivalent (FTE) positions for CETA in the administrative cost pool of the Department of Labor, based on conservative estimates. He noted that before the RIF the pool was paying for 64.99 positions, while after the RIF it was paying for 63.15 positions. He also testified that the funding of the 64 positions would require that carry-over funds be used.

Carry-over funds are those remaining from a prior year's appropriations which can be used by the agency in the following year. The use of carry-over funds in this case implies that the agency would be using more funds in the present year than it received in appropriations. If the current appropriations level were retained, the agency would be faced with a funding shortfall in the next year—or at some future year—and would have to make suitable adjustments at that time. Thus, Gettemy's analysis points only to the possibility that the RIF could have been delayed. Loder testified that he anticipated reduced funding for CETA in the ensuing years. In addition, Loder stated that it was common to have programs overrun their costs, thereby necessitating the availability of some carry-over monies. The ability to go forward without the RIF is not clear-cut, and it was not unreasonable for Loder to institute the cutback.

C.

Each plaintiff's employment with CETA represents a different set of circumstances. Richard Gettemy has been with the CETA Division and the Department of Labor longer than any of the other plaintiffs. He was originally hired in 1970 as a research assistant and he had worked for two predecessor organizations of CETA before transferring to the division at its creation in 1974. From the inception of his employment with CETA to the present Gettemy has held the job title of administrative services manager. As previously mentioned, he performed several of the functions of an operations manager and was called the acting operations manager for a brief period of time. It does not appear that he was ever officially designated to the position of operations manager.

When Gettemy was initially transferred to CETA, he was told that he was "blanketed in" to the new position. This is reflected in the personnel forms prepared for the transfer. Gettemy understood this term to connote that he would retain all of his previous rights and privileges. He received a salary increase with the transfer and considered it as a promotion.

Gloria Smith was initially employed by the Department of Labor in May 1971 in the Employment Division as an employment security analyst. She later held other positions in the Employment Division until 1979, when she moved to the CETA Division. When she made that change she submitted a letter of resignation to her supervisor in the Employment Division; she stated that she did not want to leave her position but felt that she was under "undue pressure."

When Smith left the Employment Division she was precluded from further participation in its pension plan, because that plan was separate from others. Because of that, she therefore asked for a refund of her contribution, but she felt that all of her seniority rights would transfer with her to CETA, based on conversations she had with Dixie Gibbons, who was then the CETA director. Documentary evidence in the case leaves the fair inference that the discussions about seniority were based primarily on annual and sick leave. Smith had a negative balance in her annual leave and was assessed that upon her transfer.

Donna Polk began employment with the Department of Labor as a provisional employee in April 1972 in the Division of Employment. She became a permanent employee in October 1972. While in the Employment Divi-

sion she held the positions of equal employment opportunity representative and equal employment opportunity officer. She transferred to the CETA Division in early 1975 upon the urging of administrators of both the Department of Labor and CETA. Polk testified that at the time of her transfer the mechanics of the process were uncertain and she therefore felt it necessary to resign her position with the Employment Division in order to transfer to CETA. She submitted a letter of resignation, which stated that her reason for resigning was the transfer to CETA. Her transfer to CETA was not occasioned by a change of physical location, but she did receive a new supervisor. She did not complete a merit system examination to obtain the transfer, even though she received a pay increase and viewed the change as a promotion. Department of Administrative Services documents show only a location change, while Merit System records show a change in agency as a result of the transfer.

While Polk was at CETA she held the titles of equal employment opportunity officer and training specialist II. Polk also claims to have performed the duties of a personnel officer, although never officially appointed to that position, substantiating this claim with a number of documents. A CETA staff directive dated September 29, 1976, from Thomas Erixon, the deputy Commissioner of Labor, states that Polk will assume the duties of "Personnel Officer in addition to her duties as the EEO officer." There are several other documents in evidence that demonstrate Polk's performance of duties of the personnel officer. She was responsible for hiring new employees, handling documentation of personnel transactions, and coordinating promotions and evaluations of employees. She aided in

the preparation of an employee handbook for CETA. At one point during the time she held both positions, the regional office of CETA was concerned about her dual role; as a result, Polk did not continue handling the duties of personnel officer.

Polk submitted an application for the personnel officer II position in August 1979, but she withdrew the application after Gettemy expressed dissatisfaction with the in-house applicants for the position. It would thus appear that Polk knew that she did not hold the position of personnel officer II and that she was not performing the duties of that position.

James Baudler began his employment with the Department of Labor in August 1973 as a labor investigator in the Safety Division. On December 11, 1974, he became a probationary employee of the Safety Division, but he did not complete that probation, because he changed to the CETA Division, effective February 1, 1975. Baudler testified that he did not submit a letter of resignation to the Safety Division, even though his personnel record shows that he resigned the division; he decided to transfer to CETA upon the urging of Tom Erixon, who was his roommate at the time. Baudler did not take a merit system examination to receive the CETA position. He received a pay increase with the transfer and he viewed the change to CETA as a promotion.

D.

In early 1981 John Hanlon, the Commissioner of Labor, requested that Loder prepare guidelines for a reduction in force for CETA. Loder's meeting with Hanlon

appears to have been similar to meetings Hanlon held with other division directors in the hope of having a unified approach to RIFS throughout the Department of Labor. Loder testified that the RIF was instituted not only because of reductions in funds but also because of his desire to change the management structure of the division to have a greater proportion of the division's budget spent for the delivery of programs to the recipients and less on program administration. He felt that the functional organization of the division at the time he assumed office consisted of two subunits, planning and administrative services, with a hodgepodge of clusters of employees in other areas. As discussed above, it appears from the documents in evidence that the CETA Division consisted of three, rather than two, subunits, even though it may actually have been operating as two, given the absence of an operations manager.

Loder's revised structure of CETA put the functions into two categories, which, as discussed above, eliminated the positions of both Gettemy, the administrative services manager, and Baudler, the planning manager. The effect of the elimination of the positions, along with the consolidation of functions, was to leave Dan York, the deputy director, and Gary Targoff, the operations manager, in charge of the functions of the division. Both York and Targoff were brought into the division at a time when a Republican administration was in office in the Nebraska governorship. York and Targoff are Republicans; Baudler is a Democrat. Both Baudler and Gettemy were employees who had been with the agency primarily or totally during a Democratic administration in the Nebraska governorship.

The RIF was styled after guidelines issued by Loder on July 9, 1981. The guidelines define the order of layoff for CETA employees by using a "retention point" calculation, based on the time of service each employee had with CETA and the results of periodic performance evaluations. When an employee had a satisfactory performance evaluation for a given period, the retention points are to be calculated by multiplying the months of service by 1.0. If the employee has received a commendable rating for a certain period, the months of service are to be multiplied by 1.5 to obtain the retention points. The guidelines also provided for bumping to different positions within CETA. The bumping rights are rank-ordered. Employees are to be able to bump to the same classification in another organizational unit or subunit. Barring that, they may bump to the next lower position in the same class series. In the absence of both of the above, an employee is enabled to bump to a classification that the employee previously held while continuously employed by CETA, but only if the classification at the time of the bumping is still being used in CETA.

The RIF guidelines draw heavily upon terminology in the Nebraska Merit System Rules in force at the time the guidelines were prepared. A "class of position" or "class" is defined by the Rules as one or more positions functionally similar so as to require the same minimum qualifications of training and experience and the same test of ability and fitness. To "bump" is to fill a position with an employee with greater seniority at the expense of one with less seniority, so that the senior employee may avoid layoff. Retention points are not defined in the Rules. Instead, a series of provisions of the Rules are

relied upon to arrive at the retention point system. Any classified position must be filled by an appointment. Employees are initially appointed on a probationary basis only, and later upon successfully completing the probation period attain a permanent appointment status. The appointing authority is defined in terms of the agency given the power to make an appointment. In turn, an agency is defined as any branch of state government that is a member of the Merit System. Each of the four divisions of the Department of Labor is a separate member of the Merit System. This came about because federal guidelines required that the Employment Division be a member of a state merit system in order to qualify for federal monies. At a later time the rest of the Department of Labor was included in the Merit System, but as separate agencies. CETA was admitted to the Merit System upon its formation and its predecessor organization was removed at that time.

The restriction in the RIF guidelines on length-of-service credits to include only time spent in CETA results from a narrow reading of the Rules. The terminology used in the CETA RIF guidelines differs somewhat from analogous provisions in the Merit System Rules. The layoff guidelines in the Rules calculate retention points based on the continuous periods of employment from the "original appointment" of the employee. The RIF guidelines avoid this terminology by calculating points only from the appointment into CETA. The plaintiffs claim that the "original appointment" language of the Rules requires that they be credited with service spent in other divisions of the Department of Labor.

Their claim has some basis in prior Merit System Rules as they relate to what would be a reasonable interpretation of the "original appointment" language in the present rules. Article XII, § 4(2)(c)(4), in both the 1971 and 1974 Rules provides that the "employee's total years of service with the Joint Merit System agencies shall be used rather than length of service in his present classification" for determining the length of continuous service used in retention point calculations. A reasonable interpretation of the "original appointment" language involving a knowledge of the prior rules would lead one to believe that all service in Merit System agencies should be counted toward retention points. As well, prior to 1978 the Rules defined "original appointment" to include all time with *all* Merit System agencies. The defendants attempt to present the false dilemma that counting experience from all Merit System agencies would allow employees to bump to positions in other agencies whenever there was a RIF in their agency. That would result only from an interpretation of the Rules that did not give proper weight to the language contained therein. In the 1971 and 1974 Rules, specifically Article XII, § 4(2)(c)(6), employees may exercise seniority rights in a certain manner. The ultimate limitation on that manner is a designation by an appointing authority. It is logical, and mandated by the Rules, that one appointing authority could not specify a position anywhere in any agency. Of course, if one appointing authority covered several agencies, as appears to be the case for the Department of Labor, there could be some interagency bumping under the former Rules. The current Rules specifically provide that bumping may take place only to the positions within the particular agency, without mention of an appointing authority.

The plaintiffs also dispute the accuracy of the RIF guidelines in their computation of retention points, based on a number of factual circumstances that surrounded their transfer to CETA. These circumstances supposedly indicate that the administrators at the time of the plaintiffs' transfers understood and represented that seniority for retention point purposes carried over in a transfer between divisions of the Department of Labor. First, the paycheck stubs of each of the plaintiffs show "service years" or the total amount of time the employee has been employed by the state. The number of service years was undiminished by the transfer to the CETA Division. This number is used to calculate the amount of annual and sick leave. Second, the plaintiffs all appear to have been told by their superiors that they would not lose seniority rights by transferring to CETA. Third, Merit System Rules prior to 1978 did not define service years so as to leave an implication that it was different from seniority. Whether the discussions of seniority rights centered on what would happen in the event of a layoff or a reduction in force is not clear from the evidence. Although the plaintiffs testified that they were assured that seniority carried over would include accrued time served in other divisions of the Department of Labor, other facts leave at least an inference that there may not have been specific discussion of that subject. The more pressing concern to an employee not faced with any threat of layoff would be the vacation and sick leave balances, as well as salary. Therefore, it is logical to infer from the facts that discussions were centered around these areas. Gloria Smith was assessed a deficiency in her annual leave before transferring, an event that would turn one's attention to the

annual and sick leave issues. James Baudler was not yet a permanent employee when he left the Safety Division. Richard Gettemy simply transferred through CETA predecessors; inasmuch as the program had grown with nearly every transfer he made, it is not likely that the concern of a RIF loomed as being imminent. Donna Polk resigned her position with the Division of Employment when she went to CETA; if a serious concern about retention points in a layoff situation had been perceived, it seems unlikely that she would have resigned a position, when to do so could create an inference that protection from layoff would be lost.

Some doubt is cast on the plaintiffs' assertions that they were told that service time for retention point calculations carried over to their new divisions by certain documentary evidence and testimony introduced at trial. In a letter dated May 22, 1974, from James Edington, Merit System Director, to Donald Bumgarner, Employment Division personnel officer, Edington stated that the seniority rights apply only to the particular agency and do not transfer, although "continuous service rights," such as sick leave, annual leave, and retirement, are transferable. The letter stated that seniority rights were circumscribed by the particular "program area" in which the employee worked. When testifying at trial, Bumgarner stated that he agreed with this interpretation of the Rules, and that there was some confusion concerning the plaintiffs' seniority rights at the time they were transferring to CETA. He felt that the confusion existed only on the part of the Department of Labor administrators, while he was clear as to the limitations on seniority to the particular program and agency.

The Edington letter contradicts some of the testimony of Gloria Smith. Smith testified that she had talked with Edington and that he assured her that her seniority rights concerning job security—presumably protection against layoff—would transfer with her from Employment Division to CETA. That testimony is inconsistent with the contents of the letter that was written before the supposed conversations took place. Mr. Edington died prior to the trial of this case and thus his testimony was not available at trial.

Other factors existed that might have made the plaintiffs aware that something was awry with their conclusion that service time for retention points carried over to a new division. Each division of the Department of Labor had its own personnel office. Such a separation, coupled with other factors, might put one on notice that service rendered in one division might not be of import after transfer to another division. In addition, Jerome Kromberg, a former administrator, had warned that transferring to another department might cause the loss of seniority for retention point purposes. As previously mentioned, some of the personnel records showed resignations, indicating a probable loss of time toward retention. It should be noted that the best that can be said of the personnel records is that they are confused. I do not believe they portray a discernable pattern with any degree of regularity.

Gettemy, Baudler and Polk have another aspect to their claim in addition to the retention points: all three claim bumping privileges broader than the defendants have been willing to acknowledge. Gettemy and Baudler advance similar claims concerning bumping to the opera-

tions manager position in the restructured CETA Division. Polk advances a claim with respect to bumping to a personnel officer position as well as to similar positions in any division of the Department of Labor and possibly in any Merit System agency.

Baudler's claim that he is entitled to bump to the operations manager stems from two allegations. First, he claims that the duties of the operations manager position under the new organization of CETA consisted in part of the duties of the CETA operations manager on occasions when the position was vacant and that that partial performance of duties entitles him to bump to the position in the new organization. I do not believe that the temporary assumption of only part of the duties can realisticly be said to comprise the assumption of the operations manager position, so as to allow him to bump to that position as one previously held. The same is true with respect to the claim that he should be able to bump to the operations manager position because the new position contains a part of the duties of the planning manager position. The difficulty, of course, is that the Merit System rule dealing with RIFs appears to be directed at cutbacks within an existing organization structure and not at a cutback combined with reorganization. Employees are directed to bump either to lower positions in the same classification or to another classification previously held. In most cases that positions will be preexisting and existing at the time of the RIF. Nonetheless, an amalgamation into a position of some of the duties of another position does not constitute a sufficient claim on the newer position to entitle one to bump to it.

Another portion of the Merit System Rules deals somewhat with Baudler's claim of entitlement to the operations manager position. Merit System Rule 4(4) provides that, when a position's duties are changed and the position is "reallocated" or redefined, the incumbent of the position is entitled to serve in the position, if he or she meets the minimum qualifications and if the duties of the position have not appreciably changed. There appears to be no question that Baudler possesses the minimum qualifications of the operations manager position under the revised organizational structure of CETA. The crucial question is whether the position Baudler held—planning manager—was materially changed by the inclusion of the operations manager duties. I conclude that there was a substantial change and that Baudler may not claim that the position was reallocated without substantial change. Although Baudler had some operations manager duties previously, it represents a substantial change of the duties of a position to assign both operations and planning responsibilities.

Gettemy's claim that he held the operations manager position has considerable evidentiary support. It appears that he was given substantially all the responsibilities of the position and was expected to perform them, even though he never received a formal appointment to the position. It is noteworthy that he received additional pay for performing the duties and that Loder, the CETA director, recognized in a staff memorandum that Gettemy was the operations manager. Gettemy could reasonably have believed that he held the position. In view of the fact that his superiors acknowledged it and personnel forms were completed that granted him a pay increase

for the increased duties. The defendants cannot at this point say that Gettemy did not hold the position, when they earlier required him to perform the duties.

Polk's claim is similar to Gettemy's. There is adequate evidence to show that Polk performed the duties of a personnel officer, although not of a personnel officer II. She was responsible for coordinating information on employees, was titled a personnel officer in a number of documents, and the staff was notified of her status by Erixon. It is too late in the day for the defendants now to assert that she did not hold such a position, simply because she did not hold the formal classification. As with Gettemy, she was expected by her superiors to perform the duties and was publicly held out to be performing them. As well, she received a pay increase for the added responsibilities. Given these circumstances, she is entitled to claim that she held a personnel officer position. What other positions she held, if any, is unclear from the evidence.

E.

Baudler makes a claim that is separate from the others: that the actions taken in the RIF were a result of discrimination against him based on his political affiliation. Baudler is registered as a Democrat and has friendships with Erixon and Chezik, both appointees in the Department of Labor during a Democratic administration in the governor's office. Hanlon and Loder are both registered Republicans and are political appointees of a Republican administration. Hanlon was the district coordinator of the Republican governor, while the governor was a United States Congressman.

Baudler points to a number of incidents as indicative of political discrimination against him. An early event seems to be Hanlon's concern about whether Baudler had taken annual or sick leave for a day on which Hanlon met him in a public building other than a state building. Baudler testified that he was ill on the morning of February 13, 1980, and did not report to work. As the day progressed, he felt better and decided to take care of changing the name on a certificate of title to one of the family automobiles. He met Hanlon while he was in the Lincoln Federal Building to have his wife sign the certificate of title. Although Hanlon did not then question Baudler's presence outside his working environs, Baudler's status was later questioned by Hanlon. I see no way from the evidence to tie that incident to political affiliation.

Another incident related by Baudler involved a conversation he had with Loder during an evaluation interview on July 1, 1981. Baudler testified that at the end of the interview Loder made statements he characterized as "off the record," the substance of which was that Baudler was well qualified for his position and if he were a Republican he would be one of the top persons in the organization and that he felt Baudler's present job was not good for him, given the attitudes of those in power, and Loder suggested that Baudler consult a professional resume writer. On another occasion, according to Baudler, Loder told Baudler that a certain way of running a program was a "Democratic way of doing things." Baudler felt that the statement indicated a political prejudice against him. Loder testified that it was not meant in a political sense, but only as a general comment.

Another incident occurred on July 16, 1981, while Baudler was attending a Private Industry Council meet-

ing with Hanlon and others at Sidney, Nebraska. The group flew into Sidney the night before the meeting and had stopped at a lounge for a drink. Hanlon bought the entire group a drink. According to Baudler, when he thanked Hanlon for buying the drink Hanlon said, "I hope you choke on it." Hanlon does not remember much about the evening and does not remember making that statement. Robert Shanahan, a Department of Labor employee who was in the group and was sitting near Hanlon and Baudler, does not remember hearing Hanlon make that remark. Baudler's version of the incident is substantiated by his diary entry for that day which includes the remark. Baudler felt that the remark was not made in jest but was an expression of anamosity toward him because of his political affiliation.

Baudler related an incident wherein he was denied a personal credit card as indicative of the political discrimination against him. After Loder became the CETA director, new telephone credit cards were ordered and Baudler did not receive one. When he complained to Loder, Loder allowed Baudler to use the credit card number from Loder's card. At trial, Loder testified that the reduced number of cards was a result of his decision to order only five cards, after Hanlon had inquired why the CETA Division had such a large number of cards—nearly seventy-five—and other divisions had far less. At that time Loder committed the CETA Division to receive no more cards than the Division of Employment had, or five cards. Given the circumstances under which Loder made the cutback and the fact that he allowed Baudler to use his credit card number, I am left with the impression that the incident had no political overtones against Baudler.

Baudler also related that on September 2, 1981, he and Daniel York had a conversation concerning plans for the RIF which was indicative of his being treated unequally because of his political affiliation. York and Baudler had an "off the record" discussion in the parking lot concerning Baudler's future with CETA after the RIF. After York described the options that would be available to Baudler, Baudler asked whether he was being treated in that manner because the planning section of CETA was not doing a good job. According to Baudler, York replied that Baudler's performance was not a factor in the RIF decisions but that "it was purely partisan decisions being made." At trial, York denied making that statement. Baudler's version is bolstered by an entry in his diary that is fairly contemporaneous with the event.

Two other matters have been offered to show political discrimination against Baudler. The first is the testimony of Thomas Erixon, who stated that he understood that Baudler would be treated unfairly because he was considered an Erixon-Chezik protege. Both Hanlon and Loder denied making any statement using such words or concept. Another incident is said to be indicative of a pervasive political nature of the RIF. After the first preliminary injunction was entered in this case, Mark Starr, as Assistant Attorney General for the State of Nebraska, and James Walsh, a personnel officer, had a conversation concerning where to place the plaintiffs during the pendency of the lawsuit. Walsh apparently made a statement questioning whether the plaintiffs should be put on "latrine duty." At trial Walsh testified that the statement was made because of a feeling of exasperation concerning what he should do with the plaintiffs' job responsibilities during the pendency of the action.

A careful assessment of the evidence results in my finding that a preponderance of the evidence shows that the decision concerning Baudler's position was based in some part on his political affiliation and identity with a prior Democratic administration. The most persuasive evidence in this regard is the admissions by Loder and the statements by York reflecting such discrimination. The remarks of the other individuals, for example, Hanlon's "choke on the drink" statement, only add credence to such a claim. Walsh's statement to Starr concerning latrine duty was adequately explained; Hanlon testified at trial that he would not have discriminated against Baudler and cited the assistance he gave Baudler and his bride for their wedding reception and the purchase of a wedding gift for them, an unusual practice. While of respectable weight, that evidence is not sufficient in light of the other evidence that political motivation played a role in the RIF. Hanlon had a seemingly high interest in Baudler's use or abuse of sick leave, an abuse of which could be a reason for discharge, whether politically motivated or not. Hanlon made disparaging remarks to Baudler on at least one occasion, and Loder reflected pressure from above because of Baudler's political affiliation. While Baudler's political affiliation may not have been the sole criterion for his selection for layoff or forced demotion in the RIF, the greater weight of the evidence shows that it more likely than not that Baudler's treatment in the RIF was due at least in part to his political affiliation as a Democrat.

II.

The plaintiffs have brought these three actions, claiming a deprivation without due process of law of their con-

stitutionally protected interests in employment granted them by the Department of Labor. They also make the claim that the action of the CETA Division in attempting to alter the terms of the contract of employment with them is an impermissible interference with a private contract by a state agency. I shall discuss each constitutional claim in turn. Before that, however, I find it necessary to address a sovereign immunity issue and jurisdictional issue raised by the defendants.

A.

Each complaint names the State of Nebraska, the Department of Labor, and the Joint Merit System as defendants. The defendants contend that the inclusion of these parties is improper, because they are immune from suit under notions of sovereign immunity under the Eleventh Amendment. I find that there is no such immunity in this case.

The plaintiffs' claims necessarily rest upon the contract of employment between them and the defendants and the alleged attempts to breach the contract. The due process claim looks to the employment contract to find a constitutionally secured right of which the plaintiffs may have been impermissibly deprived. As well, the contract-clause claim must have as its base the supposed contract of employment between the plaintiffs and defendants. Without that basis there would be no interference with any contract to support an action. While it is true that states and state agencies such as those mentioned are immune from suit, see *Alabama v Pugh,* 438 U.S. 781, 782 (1978); *Edelman v Jordan,* 415 U.S. 651, 663 (1974), that immunity may be waived in certain instances. In cases

where an action is founded on contract, the Supreme Court of Nebraska has held that the state "by entering into a contract, abandons its attributes of sovereignty and binds itself, to the extent of its powers to contract, substantially as an individual does when he makes a contract." *Todd v Board of Ed. Lands,* 154 Neb. 606, 610, 48 N.W.2d 706, 710 (1951).

It is true that the *Todd* case involved a lawsuit in Nebraska state court. As such, it may be argued that the waiver in the case does not extend to a federal court, as it is not a clear manifestation of intent to waive immunity. See *Kennecott Copper Corp. v. State Tax Commissioner,* 327 U.S. 573, 577 (1946); *Rigg'e v. State of California,* 577 F.2d 579, 585 (C.A. 9th Cir. 1978). The language of *Todd,* however, is extremely broad in terms of the courts in which the waiver is effective. I do not believe that the waiver always need name federal courts to be effective therein; it is enough that the state is permitted as any individual to sue or be sued, when it is a contracting party. I also note that the court in *Todd* cited *Poindexter v Greenhow,* 114 U.S. 270 (1884). *Poindexter,* held that Eleventh Amendment concerns do not erect an immunity for cases in federal court based on an alleged unconstitutional impairment of contract by a state when the state is one of the contracting parties. 114 U.S. at 286. It would be anomalous not to extend the reasoning in the *Todd* court used in citing *Poindexter* for the constitutional prohibition on impairment of contracts to a claim under the Fourteenth Amendment based on an unconstitutional deprivation of contractural rights, when the state is one of the contracting parties. To do otherwise would dictate contrary results for identical contract suits based on dif-

ferent parts of the Constitution. Accordingly, I shall not dismiss the State of Nebraska, the Department of Labor, and the Joint Merit System as defendants, as I do not believe they possess sovereign immunity in this court on these claims.

The second issue is the defendants' contention that the plaintiffs may not bring the part of their action based on an impermissible impairment of contract, because they have failed to allege a jurisdictional base to support the claim. The plaintiffs' complaints allege only the jurisdictional counterpart of 42 U.S.C. § 1983, 28 U.S.C. § 1343(3), as a jurisdictional base to the actions. The defendants are correct in pointing out that in *Monroe v Pape,* 365 U.S. 167, 171 (1961), the Supreme Court of the United States held that § 1983 allows redress of violations of rights secured by the bill of rights and incorporated in the Fourteenth Amendment due process clause. I believe, however, that their interpretation of *Monroe v Pape* as precluding a claim under § 1983 based on Art. 1, § 10 of the Constitution to redress an impairment of contract by a state is incorrect. Section 1983 allows redress of deprivation of violations of "rights, privileges, or immunities secured by the *Constitution and laws . . .*" (emphasis added) The plain language of the statute does not differentiate between various constitutional rights based on their origin in the Constitution. The Supreme Court in *Parratt v Taylor,* 451 U.S. 527, 536 (1981), noted that the inquiry under § 1983 is whether there has been a deprivation of a right secured by the Constitution without differentiating as to its origin. As well, the court in *Maine v Thiboutot,* 448 U.S. 1, 7 (1980), said that the jurisdictional counterpart of § 1983, 28 U.S.C. § 1343(3), is narrower

than § 1983 in that jurisdiction is limited to claims seeking redress under laws providing for equal rights, while § 1983 permits actions generally arising from the Constitution and laws of the United States that provide a right of action. While the defendants' claim may stand as to the bounds of jurisdiction conferred by § 1343(3), it is incorrect as to the bounds of relief available under § 1983.

I have noted that the plaintiffs did not allege any jurisdiction in their complaints, other than § 1343(3). While that section may not support an action under § 1983 referencing the prohibition on state impairment of contracts, that does not require a dismissal of this part of the action for want of subject matter jurisdiction. It is clear from the allegations in the plaintiffs' complaints that a claim arising under the Constitution is presented; as such, there is federal question jurisdiction under 28 U.S.C. § 1331. The failure to plead federal question jurisdiction specifically is not fatal to the claim in such circumstances. See *Jones v Freeman,* 400 F.2d 383, 387 (C.A. 8th Cir. 1968). It is preferable that the defendants raise this type of deficiency in a motion made well in advance of trial, rather than in their trial briefs. Because the challenge is raised so late in the proceedings and the necessary change so minor, and because jurisdiction is so evident, I shall not require the plaintiffs to amend their complaints to include allegations of jurisdiction under 28 U.S.C. § 1331.

B.

The plaintiffs' first claim is that they were deprived without due process of law of a property interest in their continued employment with the Department of Labor. Each of the plaintiffs' claims varies somewhat from the

others. Gettemy claims that he has a constitutionally protected interest to bump to the position of operations manager, because of his former occupancy of that position, and that he should be credited with retention points indicative of his entire time of employment with the Department of Labor. Polk claims that she should be able to bump to a personnel officer II position and should be credited with retention points indicative of her entire length of service with the Department of Labor. In addition, she claimed at trial that she should be able to bump to any comparable position in Nebraska state government. Smith simply claims that she should receive retention points calculated to reflect her total time of employment at the Department of Labor. Baudler claims that he is entitled to retention points for his total service at the Department of Labor, is entitled to bump to the operations manager position, and has been unfairly discriminated against because of his political affiliation.

Each of the due process claims discussed above involves a three-step analysis. I must determine, first, whether there is an interest protected by the due process clause of the Fourteenth Amendment. *Board of Regents v Roth,* 408 U.S. 564, 571 (1972). Second, I must determine whether there has been any taking of that property interest. *Parratt v Taylor,* 451 U.S. 527, 536 (1981). And third, I must determine whether any taking of the property interest was done without due process of law. *Parratt v Taylor,* 451 U.S. at 537.

1.

The parties to this action agree that the plaintiffs possessed some property interest in continued employment that would be protected by the Fourteenth Amendment.

There is no agreement as to the exact nature of the interest. The determination I must make is one of federal law that references state law to aid in the determination. *Board of Regents v Roth,* supra 408 U.S. at 577. The nature of the interest—not its title—created by state law is determinative of whether there is a constitutionally protected property interest. Such an interest must represent more than a unilateral expectation and must rest on a legitimate claim of entitlement. *Id.* Such a claim may rest on something short of a state statute or a formal contractual arrangement. *Perry v Sindermann,* 408 U.S. 593, 601 (1972). The circumstances of a particular arrangement may give rise to a legitimate claim of entitlement. *Id.,* at 602.

In the case here, it is conceded by all that the plaintiffs posess property rights in retention points and bumping rights at least equal to those granted them in the RIF guidelines. The defendants assert that the plaintiffs are entitled to no more, while the plaintiffs assert further rights. The extent of the rights in question can be determined by using a number of sources, including the Merit System Rules, the representations of individuals in positions superior to the plaintiffs, and facts surrounding the plaintiffs' employment.

One point of contention is whether the plaintiffs' retention points should include total service in the Department of Labor or only service while in the CETA Division. The Merit System Rules provide the answer. The reasonable interpretation of the present Rules entitles each of the plaintiffs to a reasonable expectation that he or she would receive retention points calculated on their entire tenure with the Department of Labor. The 1978 Rules

should not be interpreted in a vacuum but should be considered in light of the previous versions of the Rules. Article XII, §4(4) of the 1971 Rules provides that seniority for computation of retention points is to be calculated based on "the employee's total years of service with Joint Merit System agencies." The 1974 Rules contain identical language. The 1978 Rules provide in Rule 12(1)(c)(iii)(A) that retention points should be calculated based on "all continuous periods of employment between the date of original appointment and the date of layoff." "Original appointment" is not defined anywhere in the 1978 Rules. Given the provisions of the previous Rules, it would seem illogical to place the new term "original appointment" in the Rules without a definition, if there was an intent to alter materially the method of computing tenure for retention points. The change from computing retention points based on total Merit System agency time to time spent only in the most recent agency is material. The plaintiffs had a justified expectation in the interpretation of the current Rules that would provide them with credit for the total time spent in the Department of Labor, regardless of division.

My conclusion in this regard is bolstered by the continued representations of the plaintiffs' superiors to that effect. While it is true that a letter of James Edington, the Merit System director, states that the plaintiffs' interpretation is incorrect, the Rules in effect at the time the letter was authored militate against Edington's interpretation. The plaintiffs were told by their superiors at various times that they would not lose seniority by transferring to CETA. The Edington letter is not adequate to defeat justified expectations, when considered in light of

the representations of the superiors and the language of the Rules.

The transfers to CETA Division by Polk, Smith and Baudler were based at least in part on assurances that they would retain their seniority. Gettemy represents a situation somewhat different, because he was employed in a succession of organizations that were the forerunners of CETA. In this situation the circumstances are even more compelling, given the logical meaning the Rules, to give rise to an expectation that he would receive seniority credit in retention point calculations for the time he spent in the predecessor organizations to CETA.

That the plaintiffs Polk and Smith submitted letters of resignation from the divisions of the Department of Labor should not limit their justified expectations of credit for the total time spent in the Department of Labor. Both testified that they submitted the letters of resignation because there was uncertainty as to the exact method of transferring between divisions and that they did not have an intention to forfeit all their seniority for retention point calculations. Both Polk and Smith transferred only after discussing the seniority issues with their superiors and receiving assurances that they would not lose any seniority by the transfer.

The payroll cards of Baudler and Smith that show they resigned their divisions before moving to CETA Division should not defeat their expectations of continuous credit. They both testified that they had not seen the cards before the present litigation. It would not seem appropriate that those cards could have had any effect on their expectations when they had no knowledge of them.

Holding that the plaintiffs are entitled to retention points calculated on the total time they have spent at the Department of Labor leaves me with another inquiry. The formula in the 1978 Rules for computation of retention points differs from that in the 1971 and 1974 Rules. All calculate retention points by adding length of service points (one point per month) to performance evaluation credits, based on an assignment of values. The 1971 and 1974 Rules assign numerical values ranging from zero to ten, depending on the level of performance for a particular evaluation. The 1978 Rules assign numerical values ranging from zero to two and one-half. The difference appears to reflect a shift in primary emphasis from performance to length of service. All of the plaintiffs commenced employment with the Department of Labor during periods when they have been covered by the former method of calculating retention points. Only Smith transferred to the CETA Division after the effective date of the 1978 Rules, thereby calling into question whether a transfer should make a difference in the method of calculation, when it occurs after a new rule is implemented.

Unlike my interpretation of the 1978 Rules concerning the length of service to be credited to the plaintiffs for retention points, my interpretation of the 1978 Rules with respect to the performance portion of the calculation displays a difference in the method of calculation. The issue becomes, under the case law cited above, whether the plaintiffs enjoyed a justifiable expectation that the terms of the Merit System Rules would remain constant with respect to the method of calculating retention points. I conclude that they did not and that the defendants could

change the manner of calculation with respect to the computation of the performance rating retention points. This conclusion rests on a very narrow ground. Specifically, I conclude that the rights of the manner of calculation did not vest in the plaintiffs prior to the time of the layoff. I make no intimation that the result would be the same, if there were a manipulation of the rules sometime prior to a layoff to achieve a desired result in the layoff. Such a situation is not present in this case.

The plaintiff Baudler's claim contains an additional element that requires examination of the underlying right. He claims that the Merit System Rules provide him with a constitutionally protected right to be free from discharge or layoff, when the motivating factor is his political affiliation. The notion that personnel decisions concerning Merit System agency employees are not to be made on the basis of political affiliation permeates the Rules. Section 1(2) (e) of the 1978 Rules states that one of the merit principles is "assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation." Furthermore, the provisions concerning layoffs and RIFs contained in Rule 12 are directed at accomplishing the end, based on seniority and performance and not on political connections. Baudler enjoyed a right under the Rules to be free from a layoff motivated in any substantial way by political ties. It was a reasonable, objectively based expectation.

The claims of Gettemy, Polk and Baudler also contain a claim that they have the right to bump to certain categories of positions. I shall discuss each plaintiff separately, because of factual differences.

Polk's claim that she should be able to bump to any agency in state government does not represent a justified expectation giving rise to a protected property interest. All versions of the Merit System Rules before me make it reasonably clear that the employee is limited to bumping to a position previously held with the same agency. As with the method of computation, I believe that bumping rights do not vest until the time of the layoff or RIF, so the only rules I need to consider are the 1978 Rules, because it would be unreasonable to establish a bumping framework with reference to certain positions as to a past time, when the nature and composition of state agencies is so subject to change, as is illustrated in this case. Rule 12(1) (c) (ix) limits bumping to positions previously held while in the continuous employ of the agency. Given the definition of agency in the 1978 Rules, as including only CETA, the limitation would prevent the plaintiffs from bumping to positions outside the CETA Division. Thus, Baudler and Gettemy would be entitled to bump to the operations manager position within CETA, provided they held the other qualifications to be able to bump under the Rule. Polk's claim that she should be able to bump to a comparable position anywhere in state government is unfounded and refuted by the plain language of the Rule. As well, I have not seen any evidence in the trial that would indicate that she should have a justified expectation of such an expanded bumping right, based on representations of her superiors or otherwise.

The question then becomes: exactly what are the bumping rights to which the plaintiffs are entitled? Rule 12(1) (c) (xi) of the 1978 Rules restricts the right to bump

to "a position in the next lower class of position in the same series as the class of position in which layoffs are to be effected, or, in the absence of a lower class of position in the same series, to a class of position which the employee has formerly occupied while in the continuous employ of the agency." Gettemy and Baudler both seek to bump to the operations manager position. Under the findings of fact set forth above, I found that Gettemy occupied such a position but Baudler did not. Accordingly, Gettemy has the right to bump to the operations manager position, subject to the limits imposed by his retention points.

Polk's claim with respect to bumping rights is troublesome. Under the analysis immediately above, she is not entitled to bump to positions outside CETA, despite her testimony that her understanding, based on employment in private industry, was that she could do so. It appears that Polk has held two positions within CETA during her tenure, EEO compliance officer and personnel officer. She now seeks to bump to a personnel position, titled personnel officer II. I do not believe that she actually ever held such a position and thus is not entitled to bump to a personnel officer II position. Her experience may entitle her to bump to a personnel officer I position, although there was no evidence at trial of the description of that position vis-a-vis Polk's performance of the duties. I shall give Polk an opportunity to establish with further evidence the job description of various personnel officers within CETA before I decide the extent of her right to bump to such a position.

2.

The second determination concerning the propriety of the defendants' actions is to examine whether there was a deprivation of the rights I found above. *Parratt v. Taylor*, 451 U.S. 527, 536 (1980). Under this phase of the due process analysis, I believe that it is fairly clear that there has been a deprivation in certain of the claims. All four plaintiffs were deprived of their rights to have the seniority portion of retention points reflect their total time spent with the Department of Labor. Gettemy and Polk were also deprived of bumping rights that would avert a total loss of their positions with CETA. Baudler was also deprived of his right to be secure in his employment from certain politically motivated employment decisions.

3.

The next phase of the due process analysis is to determine whether the deprivations of protected interests were made without adequate due process of law. *Parratt v. Taylor, supra*, 451 U.S. at 537; *Baker v. McCollan*, 443 U.S. 137, 145 (1979).

With respect to the claim of seniority credit for all time spent while working in the Department of Labor, it is clear that there has been a deprivation without due process. Although the Merit System Rules provided for such credit and the almost unanimous representations of the plaintiffs' superiors were to the effect that they had such rights, the RIF guidelines denied their existence.

The restrictions placed on Gettemy and Polk with respect to their bumping rights present a similar situation

in terms of the deprivation. The rights were conferred on these plaintiffs by the Merit System Rules and the conduct of the administrators in using the Rules. When the RIF guidelines were drawn up, there was no mention of the formalities being a prerequisite to bumping to a position that was in fact previously held. The attempted exercise of the rights was met with a flat denial of their existence—clearly a deprivation with no process at all. There was no hearing given, no compensation offered for the rights, and no justification given for the deprivation.

Baudler's claim concerning the discrimination against him because of his political affiliation presents probably the clearest instance in this case of a deprivation of a right without any process at all. His constitutionally protected interests of free speech and freedom of association, as well as the interest secured by the Merit System Rules, were summarily abridged.

The defendants urge that the plaintiffs were not deprived of their seniority rights without due process, because the rulemaking procedures necessary for the adoption of the Merit System Rules provided adequate process for the change in the plaintiffs' rights. I do not need to pass on this contention at this time, because I have found that the current Merit System Rules confer the expectation of retention points calculated on the employees' entire time with the Department of Labor. In addition, I believe that the current Merit System Rules allow Gettemy and Polk to bump to positions, the duties of which they were required to handle even though they were never formally appointed to those positions by Merit System procedures. Baudler's claim does not present a case where

the Merit System Rules have somehow been changed so that political affiliation can become a criterion for a RIF. Whether changing the Rules through the established manner would provide the requisite due process I do not know, for those issues are not presented here.

The defendants also assert that the appeal procedures provided by the Merit System Rules provide an adequate post-deprivation process so as to satisfy the due process clause. I disagree. There are two possible interpretations of this argument. First, I can interpret the argument to follow in the line of *Parratt v. Taylor,* supra, by stating that there was adequate due process provided by the post-deprivation procedures under the Merit System Rules. Second, the argument may represent an effort to urge that the plaintiffs are required to exhaust their state administrative remedies through the Merit System Rules before coming to this court with a § 1983 action.

The second possible interpretation of the defendants' argument is most easily dealt with. The Supreme Court of the United States has held that in most cases exhaustion of administrative remedies is not required before a plaintiff can proceed with a § 1983 action in federal court. See *Patsy v. Board of Regency,* 50 U.S.L.W. 4731, 4736 (1982). The case here is not one where exhaustion is required.

The first interpretation of the argument—that adequate due process is available through the Merit System Rules—is more troublesome. Under Rule 13 of the 1978 Merit System Rules the plaintiffs appear to have had an avenue open to appeal. I do not believe, however, that that avenue represented adequate procedures in this case.

The appeal procedure as described in Merit System Rule 13(9) contemplates an employee appeal to the Merit System, followed by a recommendation back to the appointing authority. The role of the Merit Council is advisory only; the appointing authority—in this case the CETA Division of the Department of Labor—remained the ultimate judge of the propriety of its decision. There is no neutral arbiter able to make a decision that is binding on the CETA Division. This is not to say that Merit System Rule 13(9) is violative of due process; it is only to say that the appeal process of that Rule does not provide a process adequate in itself to constitute a sufficient substitute for an effective pretermination process.

C.

The plaintiffs also claim that the state has impermissibly interfered with a private contract, in violation of Art. 1, § 10, of the United States Constitution. It has long been settled law that the contract clause, contained in Art. 1, § 10, limits the power of states to modify their own contracts, as well as those of private parties. *United States Trust Co. v New Jersey,* 341 U.S. 1, 17 (1977). The test to determine whether there has been an impermissible impairment of a contract is twofold. First, the action complained of must impair a contractual obligation, *id.*, at 17, and second, it must be determined whether the impairment was permitted under the Constitution. *Id.*, at 21.

In order to satisfy the first element of the test for an impermissible impairment, a contractual obligation must be found. In the case here, a possible basis for a contractual obligation is the Merit System Rules under which the plaintiffs were employed. The plaintiff urge as

well that they were employed under an implied contract stemming from their superiors' representations in addition to the Merit System Rules.

With respect to the calculation of retention points based on total length of service with the Department of Labor, I do not find it necessary to pass on whether there was an implied contract. Under my factual findings, I believe that the 1978 Merit System Rules provide an express contract of employment between the plaintiffs and the state that provides for computation of retention points using seniority based on total service with the Department of Labor. It is well settled that a state statute, and presumably a state regulation promulgated pursuant to statute, can act as a contract. provided the intent to make a contract is clear from the statute or regulation. *United States Trust Co. v New Jersey,* supra, 431 U.S. at 18. One of the policies stated in Rule 1(1) of the 1978 Merit System Rules is to provide a system of personnel administration for state employees in a state agency. Implicit in such a policy is that provisions of a contract of employment would be established by the Rules. The provisions conferring seniority for retention point purposes would clearly confer a contractual right, inasmuch as they are part of a scheme of personnel administration providing for the conduct of affairs between Merit System agency employees and state agencies. The attempt at ignoring total Department of Labor time for retention points calculation diminishes and therefore impairs that right.

The bumping rights of Polk and Gettemy are similarly established as contractual rights by the Merit System Rules. To ascertain the bounds of the contracts, its

terms need to be examined. As discussed above, the meaning of a "previously held" position is not specified in the Merit System Rules. In such a case the meaning of the language in the Rules should be presumed to be the common meaning attached to the words. It would seem that, so long as a person was placed in a position through some form of personnel action and expected to perform the duties of the position and was held out by his or her superiors as having held the position, the person would hold a position. Thus, when the Rules require that a position be "previously held," the requirement is met in Gettemy's case with respect to the operations manager position and in Polk's case with respect to some personnel officer position. Those rights were clearly impaired, given my factual findings.

Baudler's claim presents a similar situation concerning his rights under the Merit System Rules to be free of discrimination in layoffs based on political affiliation. The Merit System Rules could not be clearer in this regard, as discussed above. Baudler has a contractual right to be free from such discrimination; his superiors' actions worked an impairment.

The second step of the analysis involves a determination of whether the impairment was constitutionally permissible. The mere finding of a technical impairment of a contract is of itself insufficient. *United States Trust Co. v. New Jersey,* supra, 431 U.S. at 21. One level of analysis looks to whether the particular power is one, such as police power, that the state cannot contract away so as to prevent its exercise. The second level of analysis, assuming the power is one that the state can contract away, is to decide whether the impairment is reasonable and necessary to serve an important public purpose. *Id.*

The impairment in this case does not arise in a context where the state is not at liberty to contract away a certain power. This case is more in the nature of a spending power case than one involving the exercise of police power or the power of eminent domain. Spending power has been held to be one that can be contracted away. See *United States Trust Co. v New Jersey,* supra, 431 U.S. at 24. Thus, the central issue here is whether the impairment of the contract rights by limiting length of service credits for retention point calculations, limiting bumping, and selecting an employee for layoff based at least in part on political affiliation is reasonable and necessary to serve some important public purpose. In applying this portion of the test, it appears that the public purpose served by the impairment of the plaintiffs' contract rights to twofold—it gives the administrators greater administrative flexibility and it promotes fiscal economy, because it is possible for employees with more seniority and a higher pay level from prior service in other divisions to be displaced by employees with less seniority and a lower pay level. Neither of these possible justifications truly represents an important public purpose in this case. That is not to say that efficiency and economy are not important. It is to say that the showing ought to be that very substantial economy or efficiency will result, and that is not the showing here. Otherwise, a governmental entity could with impunity use any reduction in funding or increase of administrative flexibility at the expense of contractual expectations. Allowing such purposes to be sufficient might well rob the contract clause of the Constitution of any meaning in the area of public contracts. *United States Trust Co. v New Jersey,* supra, 431 U.S. at 26.

Accordingly, I hold that the actions of the defendants in denying all the plaintiffs the use of their entire service with the Department of Labor for the service component of the retention points, the denial of bumping rights to Gettemy and Polk, and the political discrimination against Baudler were impermissible impairments of contracts.

D.

Baudler also claims that the decision to include him in the layoff was the result of his political affiliation as a Democrat during a Republic administration, in violation of his First Amendment rights secured by the Fourteenth Amendment. This claim is grounded on the First Amendment freedoms themselves, independent of the Merit System Rules.

The defendants' actions must be tested under a three-part test. First, Baudler must have been selected for layoff by reason of the exercise of constitutionally protected First Amendment rights. *Mt. Healthy City Board of Education v Doyle,* 429 U.S. 274, 283-284 (1977). Second, the exercise of the constitutionally protected right must have "caused" the deprivation. In other words, the conduct must have been a substantial or motivating factor in the defendants' decision that deprived the plaintiff of his rights. *Id.,* at 287. And third, if the plaintiff shows that the exercise of the First Amendment right was a substantial or motivating factor, the defendants are under a burden of proof to show by a preponderance of the evidence that they would have reached the same decision, even in the absence of the exercise of the right. *Id.*

Baudler claims that he was selected for layoff because of his political affiliation and identification with a prior governor's administration that was of a different party than the admnistration at the time of the RIF. It is well established that a nonpolicymaking, nonconfidential government employee may not be discharged or threatened with discharge, based upon the sole ground of his political beliefs. *Elrod v. Burns,* 427 U.S. 347, 367, 375 (1976). Baudler is not entitled to protection by the First Amendment from dismissal or threat of dismissal, because he was in a policymaking position. As a planning manager, he was in a capacity where he formulated plans for the implementation of broad goals; he was intimately involved in the formulation of plans for the delivery of services in the CETA programs. This is the type of position that is not constitutionally protected from patronage-based decisions. Given that conclusion, it is unnecessary to pass on the other two elements of the test under *Mt. Healthy,* supra.

E.

Two other matters should be addressed. First, how much deference should I give the state administrative agency's interpretation of the Merit System Rules? Second, should certain matters concerning interpretation of the Merit System Rules be certified to the Supreme Court of Nebraska for resolution?

The defendants urge that I should give great weight to the Merit System's interpretation of its rules. Such a deference might cause me to arrive at a different interpretation of the provisions dealing with whether total time in the Department of Labor should be counted

toward the service portion of retention points. In support of their proposition the defendants cite *Columbus Community Hospital, Inc. v Califano,* 614 F.2d 181 (C.A. 8th Cir. 1980). The case cited is inapposite to the situation at hand. It deals with the proper deference to be given a federal administrative agency by a federal court in a proceeding for review of an action under the federal Administrative Procedures Act, 5 U.S.C. §§ 551 et seq. The case here is brought under 42 U.S.C. § 1983 as a challenge to certain actions. The preferable course of action in this situation is to interpret the state administrative regulations to have a meaning consistent with the Constitution. It presents less of an intrusion into the state administrative agency's province to determine that only a handful of actions and an interpretation of regulations used therein were improper than to interpret the regulations in such a manner that they must be stricken as a violation of the Constitution. Accordingly, I shall not give great weight to the interpretation of the Rules by the Merit System.

The defendants also urge that I certify certain questions of law to the Supreme Court of Nebraska. Nebraska has adopted the Uniform Certification of Question of Law Act. See §§ 24-219 et seq., R.R.S. Neb. (Cum. Supp. 1982). Under that Act it is possible for me to certify questions of state law to the Supreme Court of Nebraska. Federal courts are often left to interpret state laws and regulations and it is not every case that presents the proper situation for certification of a question of law to a state court. See *Hatfield v Bishop Clarkson Memorial Hospital,* 679 F.2d 1258, 1261 (C.A. 8th Cir. 1982).

The decision to certify can be analyzed from two levels—whether a federal court is required to certify a question of law to a state court having such a procedure, and whether a federal court in its discretion ought to certify a question to a state court. I conclude that the answer to both is in the negative.

The decision whether certification is required rests on whether a federal court ought to abstain from deciding a question of state law in a particular case. As such, the panoply of cases dealing with obstention is brought into play. The case here does not involve a criminal prosecution, see *Younger v Harris,* 401 U.S. 37 (1971), a complex state regulation scheme where there ought to be a deferral to a state agency, see *Burford v Sun Oil Co.,* 319 U.S. 315 (1943), or a state law bearing on policy of such public importance that it transcends the result of the case at bar, see *Colorado River Water Conservation District v United States,* 424 US. 800 (1976), and *Louisiana Power and Light v Thiboudaux,* 360 U.S. 25 (1959). The very nature of my findings of fact and conclusions of law concerning the reasonable expectations and constitutional entitlements of the parties gives this case a limited effect in the state personnel system. The holdings I have reached depend in large part on the peculiar facts and circumstances of this case; other cases with differing situations may well call for a different result.

The only other relevant abstention doctrine is that represented by *Railroad Comm'n of Texas v Pullman,* 312 U.S. 496 (1941). The *Pullman* doctrine requires abstention whenever the construction of a pertinent but unclear state law may avoid the necessity of a decision on a federal constitutional issue. See 1A *Moore's Federal*

*Practice* ¶ 0.203[1] at 2101 (2d ed. 1982) and cases cited therein. I doubt that the constitutional issues in this case could be avoided by certifying state law issues to the state court. The issues that could be certified would involve the possible interpretation of the Merit System Rules. However, even if the Supreme Court of Nebraska were to decide that the Rules themselves do not vest the plaintiffs with any protection from the layoff, I still must decide whether other facts and circumstances surrounding their employment would give rise to an implied contract of employment that would give them protectable expectations under the Fourteenth Amendment. Accordingly, I do not feel compelled by the abstention doctrines to abstain and use the certification procedure in furtherance of the abstention.

Although I am not required to certify questions to the Supreme Court of Nebraska, sound discretion may dictate that some matters should be certified. In this vein, the Court of Appeals for the Eighth Circuit has discussed factors that bear on the use of discretion to certify questions of law. The factors recently discussed by the Eighth Circuit, which are not purported to be exclusive, are:

1. Whether the federal court is ready to decide the case at the present time;
2. Whether the federal decision seriously invades the state's sphere of sovereignty;
3. Whether certification would entain significant delay; and
4. Whether the parties request certification.

*Hatfield v Bishop Clarkson Memorial Hospital,* supra, 679 F. 2d at 1261, n. 4

Only the fourth factor weighs in favor of certification in this case. The defendants have requested certification in their trial brief, but the briefs were submitted only a few days before trial began. There would be a significant delay by certification. Additionally, the case is not ripe for certification, because the statute requires a "statement of all facts relevant to the questions certified" and those facts are only partially known — that is, the Merit System Rules are a part of the factual and legal mix which must be relied on by this court in determining the existence of justifiable expectations amounting to constitutionally protected interests. To split off one element of that mix and later reinsert it for weighing purposes seems awkward and inappropriate. Therefore, I shall not certify any questions to the state court.

III.

Remaining is the matter of the remedy that should be accorded the parties. The plaintiffs Baudler, Gettemy and Polk each seek declaratory and injunctive relief, as well as compensatory damages; Smith seeks only declaratory relief.

Under the foregoing analysis, each of the plaintiffs is entitled to have declared by the court that they are entitled to retention points calculated to reflect their total length of service with the Department of Labor. The parties have reserved the issue of the effect of those points on the positions to which the plaintiffs may be entitled to bump. Therefore, I shall not decide that issue. The reasoning set forth earlier in this memorandum does limit bumping rights to positions within the CETA Division; the plaintiffs are not eligible to bump to positions

anywhere in state government or in other divisions in the Department of Labor.

Gettemy is also entitled to a declaration and the appropriate injunctive measures to ensure that he is considered to have held the operations manager position for purposes of the Merit System Rules and the parallel RIF guidelines.

Baudler is entitled to a declaration that his inclusion in the layoff was affected by his political affiliation, in violation of the due process rights secured him through the Fourteenth Amendment and the Merit System Rules and an impairment of contract. He is not entitled to bump to the operations manager position, because he did not hold it under the definition in the Rules. It appears that he is entitled to bump to the planning specialist position, although that apparently involves a reduction in pay. Such a reduction would amount to a penalty imposed on Baudler because of his political affiliation. I am convinced that he is entitled to injunctive relief to prevent such a penalty. Such relief should consist of allowing his demotion but requiring his pay level to remain constant.

Polk is entitled to a declaration that she is entitled to bump to some personnel position with the CETA Division. However, it is impossible to frame a declaration or injunction without further evidence.

Each of the plaintiffs is also entitled to attorney's fees and costs, pursuant to 42 U.S.C. § 1988. I shall withhold entry of judgment until appropriate materials are submitted for attorney's fees and costs, as well as a resolution of the matter of relief to which Polk is entitled. With the relief outlined above, it appears that damages

are unnecessary and will not be awarded to Gettemy, Baudler or Polk.

IT THEREFORE HEREBY IS ORDERED:

1. That counsel for the plaintiff Polk and for the defendants shall meet with the judge in his chambers on December 29, 1982, at 12:15 p.m. to discuss the matter of presenting further evidence regarding relief due the plaintiff Polk; and

2. That the plaintiff's counsel are given until January 5, 1983, to submit affidavits or other materials concerning the attorney's fees and costs to be awarded, and the defendants' counsel shall have until January 21, 1983, to respond.

Dated December 17, 1982.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV81-L-273

GLORIA R. SMITH,

Plaintiff,

vs.

JOHN HANLON, et al,

Defendants.

CV81-L-275

RICHARD GETTEMY and DONNA POLK,

Plaintiffs,

vs.

JOHN HANLON, et al,

Defendants.

CV81-L-359

JAMES L. BAUDLER,

Plaintiff,

vs.

JOHN HANLON, et al,

Defendants.

MEMORANDUM REGARDING RELIEF
AS TO DONNA POLK AND
ATTORNEYS' FEES,
COSTS, AND EXPENSES

## I. BUMPING RIGHTS OF DONNA POLK

In CV81-L-275 the matter of the determination of the bumping rights of Donna Polk is at issue following the

submission of additional evidence in the form of affidavits. The parties have also requested that the current Commissioner of Labor, Ronald E. Sorensen, be substituted for John R. Hanlon, by virtue of Rule 25(d) of the Federal Rules of Civil Procedure. That will be done.

Four affidavits have been filed in CV81-L-275 to aid in the determination of the bumping rights of Donna Polk under the Nebraska Merit System Rules. As discussed in the memorandum of decision, filing 45, the applicable Merit System Rule — Rule 12(1)(c)(ix) — provided for bumping by Merit System Agency personnel to positions within the same agency that the particular employee previously held. The evidence presented at trial demonstrated that Donna Polk held a personnel officer/EEO compliance officer position at some time during 1976; it did not reveal what personnel position Polk previously held and would thereby be entitled to bump to under the analysis used.

The affidavit of Ronald E. Sorensen discusses the various personnel officer positions throughout the Merit System agencies and their history. The affidavits of Thomas Erixon, Richard Gettemy, and Donna Polk concern the duties performed by Polk while she was a personnel officer for the CETA division of the Department of Labor.

The Sorensen affidavit, filing 53, indicates that prior to June 1, 1979, the Nebraska Merit System did not have a unified class specification system for personnel officers in its various agencies; that several classification systems for personnel officers were developed by different agencies prior to the implementation of system-wide classification; that the CETA Division did not formally request

a personnel officer classification from the Merit System until November 1979; that CETA's request was for a personnel officer II classification, and the position was filled by James Walsh; and that CETA also employed a class of employee first termed personnel assistant and, effective December 1, 1977, termed personnel technician, and those position were held by Vicki (Dahms) Starkey.

Sorensen's affidavit also contains information concerning the pay classification of Polk's position vis-a-vis personnel officers in the various Merit Systems agencies. Polk was classifed in pay grade 27 at the time she held the personnel officer/EEO compliance officer position at CETA. The only other personnel officers in Merit System agencies were classified in grade 29 at that time. The personnel officer II position was first assigned a pay grade of 27 in 1977; the personnel officer I position was assigned a pay grade of 24 in 1980.

The final portions of Sorensen's affidavit deal with the amount of responsibility given various personnel officers in different Merit System agencies. Individuals holding the personnel officer III position customarily are responsible for personnel functions for 500 to 700 employees. Smaller agencies typically did not designate personnel officers until CETA designated the personnel officer classification on November 1, 1979. CETA employed 118 employees at that time and listed no personnel officer III position on its compensation plan.

The exhibits to Sorensen's affidavit contain job descriptions for the various personnel officer positions. The description for the personnel officer I position as it was established on June 1, 1979, involves a range of functions,

including some amount of policy-making, but tending more toward clerical duties, such as keeping reports and preparing statistics. The personnel officer II position's description as established on June 1, 1979, involves many of the same duties and functions as the personnel officer I position, the major difference being that it involves a greater degree of policy-making and includes functions such as the design of programs, submission of budget requests, and designing organizational charts and personnel statistics.

The exhibits submitted to demonstrate the duties of the personnel officer III classification involve various agencies during a time span of ten years, from 1969 to 1979. The exhibits show that the personnel officer III position is a policy-making position involving such tasks as implementing personnel policies through the creation of procedures within the organization and implementation and creation of a service rating system within an organization. The emphasis in the personnel officer III position tends away from clerical and toward pure management functions.

The affidavits of Erixon, Gettemy, and Polk provide additional pieces to help fit together the puzzle of exactly which position Polk has previously held. Erixon's affidavit, filing 54, states that he designated Polk as a personnel officer of CETA at a time when a substantial increase in the number of personnel was anticipated in CETA because additional funds were expected from the federal government and that he considered Polk's position to be on a par with the four other unit heads in the CETA Division; that he did not assign a permanent job classification to Polk because he was unsure whether the

personnel position with CETA would be sufficiently permanent to merit the effort of seeking a classification; that if he had assigned Polk a classification for the personnel duties, he would have sought to assign one that was comparable to her pay, grade 27, and, if there were no such comparable positions, create a new one; that at the time Polk assumed the personnel duties at CETA there were two positions in other Merit System agencies with a personnel officer II classification at a pay grade 27 that were comprised of duties comparable to those of Polk's position. Erixon's description of Polk's responsibilities leaves the impression that they were clerical and managerial in nature, in roughly the same fashion as a personnel officer II classification. Polk appears, according to Erixon, to have a similar background to that specified in the descriptions of the personnel officer II positions provided as a part of Sorensen's affidavit.

Gettemy's affidavit, filing 55, concerns the responsibilities given to Polk during her tenure as a personnel officer/EEO compliance officer. He concludes that Polk carried out her duties in the same manner and with the same scope of authority as one possessing a personnel officer II class of position. His working relationship with Polk was the same as he presently maintains with a personnel officer II. Gettemy's description of Polk's duties while in the position seems to equate with the description of the personnel officer II pervading in the materials appended to Sorensen's affidavit.

Gettemy's affidavit also deals with an incident where Polk applied for a personnel officer II position and subsequently withdrew her application. Standing alone, the incident would seem to indicate that she did not perform

the duties of the personnel officer II position. Gettemy's affidavit illuminates the background facts surrounding Polk's withdrawal of her application for the position. According to Gettemy, he and Dixie Gibbons, then the CETA director, sought applications for the personnel officer II position in late 1979. Applications were first sought from existing employees within CETA. Only three individuals responded to the initial request for applications; Donna Polk was one of those individuals. Gibbons determined that a larger pool of applicants was needed to compare credentials and qualifications. When Gettemy advised Polk that applicants would be sought from outside CETA, Polk protested and eventually withdrew her application; she felt that internal applicants should be interviewed first and additional applicants sought only if the internal applicants proved to be inadequate.

Gettemy also states that had he been aware of any rule that required prior occupants of the personnel officer II position to be given preference in the application procedure, he would have given Polk preference based on her prior experience as a personnel officer. He knows of no rule that requires such a preference.

The final affidavit is that of Donna Polk, filing 56. Her affidavit describes the functions she performed while in the personnel position at CETA. Her statements comport with those of Erixon and Gettemy with respect to the nature of the duties she performed. Her affidavit also describes the incident related by Gettemy with respect to the application process for the personnel officer II position in 1979.

The question that must be answered at this point is whether Polk previously held the personnel officer II

position while in the continuous employ of CETA, as required by Rule 12(1)(c)(ix) of the 1978 Merit System Rules. I conclude that she did. As previously discussed, she performed the duties customarily performed by persons holding that position, her pay grade was the same as individuals holding that position, and her supervisory responsibilities were similar to others in the same position. The mixture of clerical and policy-making functions in her position with CETA appears to be very similar to the mixture envisioned in the job descriptions provided with Sorensen's affidavit for personnel officer II positions.

Sorensen's affidavit raises the issue as to whether the size of the CETA Division should have some bearing on the classification that could be given to Polk's former position. Other agencies use differing personnel officer classifications that appear to depend, at least in part, on the overall size of the agency—the larger the agency the higher the class of personnel officer tends to be under the Merit System classification. Agencies the size of CETA in 1976 tended not to have anyone in the personnel officer II classification but only in lower classifications. I do not believe that this set of circumstances should operate to bar a holding that Polk previously held the personnel officer II position. The needs for personnel administration were greater in the fledgling CETA Division at the time Polk assumed the personnel duties because it was a rapidly growing division. A stable, established agency of a size larger than CETA was in 1976 may well not have had as many demands of its personnel officer as a rapidly growing organization such as CETA. Polk's and Gettemy's affidavits indicate that Polk performed a

number of duties, such as preparing a personnel handbook and classifying positions, that may not arise on a day-to-day basis in larger and more mature agencies.

Accordingly, I conclude, based on the evidence presented subsequent to the trial, that Polk is entitled to a declaration that she previously held the personnel officer II position for purposes of the determination of bumping rights. Consistent with the analysis in the memorandum of December 17, 1982, her retention points for purposes of establishing her right to bump to the personnel officer II position should be computed on the total time of her service in the Department of Labor.

## II. ATTORNEYS' FEES, COSTS, AND EXPENSES

In allowing reasonable attorneys' fees "[t]he most useful starting point . . . is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart,* — U.S. —, 51 U.S. L.W. 4552 (May 16, 1983). Here, some difference of opinion exists as to the reasonableness of both the hours expended and the rates sought.

This litigation comprises three separate but related cases. The Smith case, CV81-L-273, in which the attorneys are Donn E. Davis and his associate, Donald W. Fertig, was filed on September 10, 1981; the Gettemy and Polk cases, CV81-L-275, in which the attorneys are Steven D. Burns and his associate, Beverly Grenier, was begun four days later; the Baudler case, CV81-L-359, again involving Burns and Grenier, came along three months later, December 4, 1981. All were similar in that they arose from a reduction in force at the Department of Labor, but each plaintiff raised issues peculiar to his or her circumstances. The cases were consolidated under Rule 42

of the Federal Rules of Civil Procedure on March 2, 1982. While cooperation among plaintiffs' counsel was evident before consolidation, it became confirmed at that point. Little unnecessary duplication appears in the time records of counsel, but it is true that conferences among counsel consumed a fairly significant amount of time and some reduction needs to be made for that.

Although the defendants now take the position that the cases "did not represent a novel civil rights complaint, nor were the legal questions of a difficult nature" (defendants' memorandum regarding attorney fees, p. 6), I conclude that the legal issues were difficult. The defendants' trial brief discussed thirty-four separate legal propositions and was forty-eight pages long; the plaintiffs' trial brief discussed eight legal points and was forty-six pages in length. My memorandum of decision, exclusive of the present one, comprised twenty-four pages, legal size, single-spaced. I think everyone treated the cases as being complex and unusual. The skill required to perform the legal services properly was a cut above the ordinary case.

The two lead attorneys for the plaintiffs—Davis and Burns—are experienced, knowledgeable, and skillful trial lawyers. Davis has been in private practice since 1954 and Burns since 1973. Burns has devoted a substantial part of his practice since 1975 to representation of employees in labor-related cases. Fertig has practiced with Davis since 1980. Grenier became a member of the bar in, I believe, 1979.

In a somewhat similar but less complicated case I awarded Steven D. Burns in 1982 a fee on the basis of

$75.00 an hour for in-court time and $60.00 an hour for out-of-court time and in 1980 a fee on the basis of $75.00 an hour for in-court time and $50.00 an hour for out-of-court time. In 1982 I awarded a fee to Beverly Grenier on the basis of $40.00 in the same case, *Nevels v Hanlon*, CV77-L-143.

The fee arrangements for all plaintiffs' counsel can be considered as essentially contingent, so some risk factor should be built into the rate.

I adopt the following hourly rates for counsel in this case:

| | | |
|---|---|---|
| Donn E. Davis | $90.00 in-court, | $75.00 out-of-court |
| Steven D. Burns | $90.00 in-court, | $75.00 out-of-court |
| Donald W. Fertig | | $35.00 out-of-court |
| Beverly Grenier | | $40.00 out-of-court |

The foregoing factors appear to be the ones mentioned in *Johnson v Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (C.A. 5th Cir. 1974), which bear upon the fixing of the number of reasonable hours and the reasonable rate to be allowed. See *Hensley v. Eckerhart*, supra, n. 4.

The extent of the plaintiffs' success is a crucial factor that should be considered carefully in determining the amount of fees to be awarded. *Hensley v Eckerhart*, supra, at 4556. Here, the plaintiffs were generally successful. Each has won a declaration that he or she is entitled to retention points calculated to reflect the total length of service with the Department of Labor; Gettemy has won a declaration and injunctive relief to ensure that he is considered to have held the operations manager

position; Baudler is entitled to a declaration that his lay-off was affected by his political affiliation and is entitled to bump to a planning specialist position without a loss in pay; and Polk is entitled to bump to a personnel officer II position. The fruits of the cases are plentiful, although less savory than the plaintiffs had hoped. They lost on issues of rights to bump to positions in other departments of state government and other divisions within the Department of Labor. Baudler lost on his claim to bump to the operations manager position. They all lost on their assertion that the Department of Labor's reduction in force was unwarranted. These claims, however, were related to the plaintiffs' successful claims and cannot be classified as being "distinct in all respects from [the plaintiffs'] successful claims," within the meaning of *Hensley v Eckerhart.* No reduction, therefore, will be made because of the unsuccessful claims.

No other factors mentioned in *Johnson v Georgia Highway Express, Inc.,* supra, appear to militate toward either a reduction or enhancement of the award of attorneys' fees in this case.

Costs and expenses remain for resolution. Perhaps the only standard presently approved by the Court of Appeals of this circuit is that the expenses, other than court costs, are not awardable if they were not reasonable and necessary. *Ladies Center, Nebraska, Inc. v Thone,* 645 F.2d 645 (C.A. 8th Cir. 1981), and *Women's Services, P.C. v Thone,* 645 F.2d 649 (C.A. 8th Cir. 1981). I shall try to be consistent with what I did in those two cases.

The defendants have challenged an item of mileage claimed by the plaintiffs Gettemy, Polk and Baudler, with

justification. The mileage for June 8, 1982, from Lincoln to Omaha should be allowed only for 120 miles.

Also challenged is a service charge of $84.48, but that was the charge by the United States Marshal, verified by the court records, for seven separate services. I find no fault with it.

Deposition costs of York, Loder, Sorensen, Hanlon, Walsh and Targoff are also questioned. I shall not allow the charges for these. Taking them was reasonable but not necessary. There is no indication that the plaintiffs reasonably anticipated that the deponents would not be available for testimony at the trial and they did in fact testify at the trial.

The long-distance telephone charges are properly to be awarded, it seems to me, but not a great deal of the photocopying expense. Because the recitation in the affidavits and attachments to the affidavits does not state specifically what use was to be made of the photocopies and in some instances does not even say what was photocopied, I cannot assume that all the photocopying was reasonable and necessary. I know that photocopies of the exhibits were made for me and for the defendants' and plaintiffs' counsel's direct use at trial, but it appears that much more copying than that was done. I shall allow the plaintiffs Gettemy, Polk and Baudler only $173.77 for photocopying.

Food expense for counsel of Gettemy. Polk and Baudler of $5.80 on June 8, 1982, will be disallowed.

This means that the items shown in Exhibit B of filing 29 in CV81-L-359 (filing 48 in CV81-L-273 and 275) are lessened by these items:

Photocopies—$1.35, $17.25, $1.50, $1.20, $11.70, $1.05, $.45, $31.35, $169.05, $45.75, $.90, $10.80.
Depositions of Sorensen, Hanlon and Walsh—$396.60.
Deposition of Targoff—$137.55.

Lunch for attorneys Davis and Burns on Omaha trip —$5.80.

leaving $852.97 in allowable costs and expenses for the plaintiffs Baudler, Gettemy and Polk.

As to the plaintiff Smith, postage charges will not be allowed, nor will discovery deposition costs of Daniel York and William Loder, leaving costs and expenses allowable in the amount of $453.46.

I shall now apply the foregoing discussion regarding fees to the number of reasonable hours spent by each attorney.

As to Davis, I find that 42.5 in-court hours at $90.00 an hour, 290.95 out-of-court hours at $75.00 an hour (20 hours have been deducted from the requested allowance for duplication in conference with Burns), and 3 hours for travel at $50.00 an hour were reasonable, for a total fee of $25,706.25.

As to Fertig, I find that 98.1 out-of-court hours at $35.00 are reasonable (one hour of in-court time is disallowed as duplicative and unnecessary), for a total fee of $3,433.50.

The plaintiff Smith, then, will be awarded a fee of $29,139.75 and costs and expenses of $453.46 as a prevailing party.

As to Burns, I find that 43 in-court hours (two hours for a pretrial conference are reclassified as out-of-court

hours) at $90.00 an hour and 291.31 out-of-court hours at $75.00 (20 hours have been deducted for duplication in conferences with Davis and two hours for a pretrial conference have been added) are reasonable, for a total fee of $25,718.25.

As to Grenier, I find that 105.3 out-of-court hours at $40.00 are reasonable, for a total fee of $4,212.00.

The plaintiffs Baudler, Polk and Gettemy, then, will be awarded a fee of $29,930.25 and costs and expenses of $852.97 as prevailing parties.

Dated June 17, 1983.

BY THE COURT
/s/ Warren K. Urbom
Chief Judge

(Filed June 17, 1983)

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EXHIBIT D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984

Appeals from the United States District Court
for the District of Nebraska

Nos. 83-2136/2138/2139-NE.

GLORIA R. SMITH, ET AL.,

Appellees,

VS.

RONALD E. SORENSEN, ETC., ET AL.,

Appellants.

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

December 6, 1984

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## EXHIBIT E

### CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The Tenth Amendment to the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Article IV, Section 1 of the Nebraska Constitution provides:

"*Executive departments; officers; when elected; terms; eligibility; books to be kept at seat of government; residence of officers; heads of departments; appointments.* The executive officers of the state shall the the Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Attorney General, and the heads of such other executive departments as set forth herein or as may be established by law. The Legislature may provide for the placing of the above named officers as heads over such departments of government as it may by law establish.

. . . Officers in the executive department of the state shall perform such duties as may be provided by law. The heads of all executive departments established by law, other than those to be elected as provided herein shall be appointed by the Governor, with the consent of a majority of all members elected to the Legislature, but officers so appointed may be removed by the Governor. Subject to the provisions of this Constitution, *the heads of the various executive or civil departments shall have power to appoint and remove all subordinate employees in their respective departments.*" (Emphasis supplied)

Nebraska Revised Statutes § 81-101 (Reissue 1981) provides:

"§ 81-101. *Executive department; civil administration vested in Governor; departments created.* The civil administration of the laws of the state is vested in the Governor. For the purpose of aiding the Governor in the execution and administration of the laws, the executive and administrative work shall be divided into the following departments: . . . (2) Department of Labor; . . ."

Nebraska Revised Statutes § 81-102 (Reissue 1981) provides:

"81-102. *Department heads; enumeration; appointment and confirmation; removal.* The Governor shall appoint heads for the various departments, subject to confirmation by a majority vote of the members elected to the Legislature. . . . The officers shall be designated as follows: . . . (2) The Commissioner of Labor for the Department of Labor; . . ."

Nebraska Revised Statute § 81-112 (Reissue 1981) provides:

"§ 81-112. *Department heads; rules and regulations; power to make.* The head of each department is empowered to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its employees and clerks, the distribution and performance of its business, and custody, use and preservation of the records, papers, books, documents and property pertaining thereto."

Nebraska Revised Statutes § 48-605 (Reissue, 1978) provides:

"§ 48-605. *Division of Employment; director; appointment; salary.* There is hereby created in the Department of Labor a division to be known as the Division of Employment which shall be administered by a full-time salaried director who shall be subject to the supervision and direction of the Commissioner of Labor. The division shall be responsible for the discharge of its distinctive functions. The division shall be a separate administrative unit with respect to personnel, budget and duties, except insofar as the commissioner may find that separation is impracticable. . . ."

Nebraska Revised Statutes § 48-606 (Reissue 1978) provides:

"§ 48-606. *Commissioner; duties; powers; annual report.* It shall be the duty of the Commissioner of Labor to administer sections 48-601 to 48-669. He shall

have the power and authority to adopt, amend, or rescind such lawful rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as he deems necessary or suitable to that end if the same are consistent with the provisions of said sections. Such rules and regulations shall be effective upon publication in the manner, not inconsistent with the provisions of said sections, which the commissioner shall prescribe. The commissioner shall determine his own organization and methods of procedure in accordance with the provisions of said sections and shall have an official seal which shall be judicially noticed. . . ."

Nebraska Revised Statutes § 48-609 (Reissue, 1978) provides:

"§ 48-609. *Personnel; powers of commissioner; bond; retirement system. Subject to other provisions of sections 48-601 to 48-669, the Commissioner of Labor is authorized to appoint, fix the compensation of, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of his duties ununder said sections.* The commissioner may delegate to any such person such power and authority as he deems reasonable and proper for the effective administration of said sections. Employees handling money or signing warrants under such sections shall be bonded under the blanket surety bond required by section 11-201. The commissioner may pay the share of the premium for such bond from the unemployment compensation administration fund. *The commissioner shall classify positions under said sections and shall establish salary schedules and minimum personnel standards for the positions so classified.* He shall provide for the holding of examinations to determine the qualifications of applicants for the positions so classified, and, except for temporary appointments of not to exceed six months in duration, such personnel shall

be appointed on the basis of efficiency and fitness as determined in such examinations. No person who is an officer or committee member of any political party organization or who holds or is a candidate for any public office shall be appointed or employed under said sections. *The commissioner shall establish and enforce fair and reasonable regulations for appointments, promotions and demotions based upon ratings of efficiency and fitness and for terminations for cause. ...*" (Emphasis supplied)

Nebraska Revised Statutes § 48-616 (Reissue, 1978) provides:

"§ 48-616. *Commissioner of Labor: cooperation with Secretary of Labor of the United States; duties.* In the administration of sections 48-601 to 48-669, the Commissioner of Labor shall cooperate, to the fullest extent consistent with the provisions of said sections, with the Secretary of Labor of the United States and is authorized and directed to take such action, through the adoption of appropriate rules, regulations, administrative methods, and standards, as may be necessary to secure to this state and its citizens all advantages available under the provisions of the Social Security Act, under the provisions of sections 3303 and 3304 of the Federal Unemployment Tax Act and under the provisions of the Act of Congress entitled *An act to provide for the establishment of a national employment system and for cooperation with states in the promotion of such system, and for other purposes,* approved June 6, 1933, as amended. The commissioner shall comply with the regulations of the Secretary of Labor relating to the receipt or expenditure by this state of money granted under any of such acts and shall make such reports, in such form and containing such information as the Secretary of Labor may from time to time require, and shall comply with such provisions as the Secretary of Labor may from time to time find necessary to assure the correctness and verification of such reports. Upon request there-

for the commissioner shall furnish to any agency of the United States charged with the administratton of public works or assistance through public employment the name, address, ordinary occupation, and employment status of each recipient of benefits and such recipient's rights to further benefits under said sections. The commissioner may afford reasonable cooperation with every agency of the United States charged with the administration of any unemployment insurance law." (Emphasis supplied)

Nebraska Revised Statutes § 81-894 provides:

"§ 81-894. *Director; duties; access to personnel records; private secretary exempt from act.* The director shall be authorized to analyze all positions of the agencies included in the provisions of sections 81-888 to 81-8,105 and, on the basis of the duties and responsibilities, classify the stenographic, clerical, secretarial and other similar related positions of these agencies. When complete, the classification plan shall include for each class of position an appropriate title, a description of the duties and responsibilities, and the minimum requirements of training, experience and other qualifications. . . ."

Nebraska Revised Statutes § 81-895 provides:

"81-895. *Director; schedule of salary or wage rates; approved by council; public hearing; revision.* The director shall, as soon as practicable after the adoption of the classification plan, prepare a schedule of salary or wage rates and ranges for each class, grade or group of positions in the classification plan. Such salary and wage schedules, when approved by the council and the Tax Commissioner after public hearing, shall be adhered to in the payment of all salaries and wages covered by any classification plan provided herein. Revisions in the salary and wage schedules, as may later be deemed necessary, shall be made in like manner.

Nebraska Revised Statutens § 81-896 provides:

"§ 81-896. *Director; examinations to determine qualifications.* The director shall provide for the holding of examinations to determine the qualifications of applicants for positions so classified, and such personnel shall be appointed on the basis of efficiency and fitness as determined in such examination. . . ."

Nebraska Revised Statutes § 81-898 provides:

"§ 81-898. *Vacancies; how filled; promotions.* All vacancies in any classified position shall be filled by the head of any agency (1) by promotion within the agency, (2) by appointment from a register established by the council for that position or (3) by transfer from some other agency, except that temporary, emergency, or provisional appointments may be made subject to rules and regulatons of the council. Promotions shall be made only after the employee has successfully passed the required promotional examination administered by the director for that position. Appointments from the register shall be made by the head of the agency from the names of the three who are certified by the director to be then standing highest on the appropriate register. *No transfer from a position in one agency to a like position in another agency shall be made without the mutual consent of the heads of the agencies concerned.*" (Emphasis supplied)

Nebraska Revised Statutes § 81-8,100 provides:

"§ 81-8,100. *Director; examine payrolls; warrants; objection filed by director; withdrawal.* It shall be the duty of the director to examine the payrolls of all agencies, employing persons in classified positions, to determine if such persons so employed in classified positions are duly qualified under the terms of sections 81-888 to 81-8,105. . . ."

Nebraska Merit System Rule 13(a) (1978) provides:

"*Appeals from dismissal, suspension or demotion:* A permanent classified employee who is dismissed, suspended or demoted may appeal in writing to the Council within fourteen (14) calendar days of the effective date of the dismissal, suspension or demotion. Within seven (7) calendar days of the receipt of such written appeal the Director shall provide the employee and the Appointing Authority with written notice of the hearing date. The hearing date shall be within thirty (30) calendar days following notice by the Director and subject to change upon mutual agreement of all parties concerned. The Council shall make its recommendations in writing to the Appointing Authority within fifteen (15) calendar days of the hearing date. After consideration of the Council's recommendations, the Appointing Authority shall make a decision which shall be recorded in the permanent records of the Agency. The Appointing Authority or designated representative shall promptly give written notice to the employee and the Merit System Office of the Appointing Authority's final decision."

Nebraska Merit System Rule Article XIII § 4 (1971) provides:

"Paragraph 1. A permanent employee who is dismissed, suspended, or demoted shall have the right to appeal to the Council not later than thirty days after the effective date of the dismissal, suspension, or demotion. Such appeal shall be in writing and shall be transmitted to the Director who shall arrange a formal hearing before the Council within ten days after receipt of the appeal. The Director shall furnish the Personnel Officer of the agency concerned with a copy of the appeal in advance of the hearing. Both the employee and his immediate supervisor shall be notified reasonably in advance of the hearing and shall have the right to present witnesses and give evidence before the Council.

"Paragraph 2. The Council, within five days after the hearing, shall make its recommendations in writing to the Personnel Officer or Agency Director for consideration by the appointing authority. After consideration of the Council's recommendations, the appointing authority shall make its decision which shall be duly recorded in the permanent records of the agency. The Personnel Officer shall, in writing, promptly notify the employee and the Merit System Office of the appointing authority's decision."

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No. 84-1431

In The
# Supreme Court of the United States
October Term, 1984

GLORIA R. SMITH,
*Petitioner,*

v.

RONALD E. SORENSEN, Commissioner of Labor, Department of Labor, State of Nebraska; WILLIAM R. LODER, Director, Comprehensive Employment and Training Unit, Department of Labor, State of Nebraska; DEPARTMENT OF LABOR, State of Nebraska; DIRECTOR OF THE MERIT SYSTEM OF THE STATE OF NEBRASKA; and STATE OF NEBRASKA,
*Respondents.*

RICHARD GETTEMY and DONNA POLK,
*Petitioners,*

v.

RONALD E. SORENSEN, et al.,
*Respondents.*

JAMES L. BAUDLER,
*Petitioner,*

v.

RONALD E. SORENSEN, et al.,
*Respondents.*

**ON PETITION FOR WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

**BRIEF IN OPPOSITION TO CERTIORARI**

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## STATEMENT OF THE CASE

Although Respondents could not agree with several assertions made by Petitioners in their "Statement of Facts," particular exception would be taken to certain of their comments. First, Respondents would disagree with the claim that the May 22, 1974, letter from the Merit System Director to the Personnel Officer of the Division of Employment of the Department of Labor "is not clear" and "is contradictory." (Petitioners' Brief, p.3). The letter has been included in the Appendix at App. 1 so that it can be seen that it clearly indicates that the Merit System Director interpreted the rules of his agency to provide retention points only for service within the particular member agency in which the affected employee worked, unlike the system allowing transfer of continuous service time which is used for the purpose of calculating sick leave, annual leave, and retirement benefits.

Second, the Petitioners gave an inaccurate portrayal of the District Court's holding. The Petitioners claimed that, "[t]he District Court found that these representations made by the agency head were sufficient to create a reasonable expectation on the part of the employees and thus a property interest and seniority rights earned prior to transfer to CETA." Upon reading the portions of the District Court's opinion appearing at pages 41a-43a in the Appendix of Petitioners' Brief, it becomes apparent that the District Court was reluctant to rely solely upon representations allegedly made to Petitioners several years previously. The Court mentioned the possibility that any reference to seniority was in the context of sick leave, vacation, and salary. Instead of resting on

alleged representations by superiors, the Lower Court's decision to acknowledge a property interest in pre-CETA employment was based upon the Court's interpretation of the Merit System Rules and was merely "bolstered" by representations from superiors that the employees would not lose seniority (Petitioners' Brief, Appendix, pp. 56a-57a).

Respondents also object to the inclusion in the Petitioners' "Statement of Facts" the assertion that "[t]he Circuit Court reversed on the basis that the representations of the Commissioner of Labor to the Plaintiffs were unauthorized under *federal* law; that *federal* standards of construction of the employment contracts should be applied rather than state standards." (Petitioners' Brief, p.6). That is a misstatement of the basis for the Circuit Court's reversal. The Circuit Court expressly stated that it was relying upon state law to determine the extent of the employees' property interests (Petitioners' Brief, Appendix, p.7a). Also, as has been noted, the misinterpretation of the Merit System Rules by the District Court was only one of the reasons for reversal.

Such other facts as may be necessary to the presentation of this matter will be set forth in the Argument.

## SUMMARY OF ARGUMENT

It would be improvident to grant a Writ of Certiorari in these cases because of the likelihood that the cases are moot and because a ruling favorable to Petitioners on the

question presented would not affect the outcome of the case.

Furthermore, contrary to Petitioners' assertions, the Circuit Court used state, rather than federal, law to determine the scope and sufficiency of the employees' property rights in their state employment. The decision of the Eighth Circuit was consistent with decisions of this Court and the Constitution.

———o———

## ARGUMENT

## REASONS WHY THE WRIT SHOULD BE DENIED

The essence of Petitioners' arguments is that the Circuit Court erred in failing to apply Nebraska law in determining the Petitioners' property rights in their state employment. In compliance with the dictates of *Board of License Commissioners of the Town of Tiverton v. Pastore,* 469 U.S. —, 83 L.Ed.2d 618, 105 S.Ct. 685 (1985), we would first point out that the matter may be moot.

The employees filed their lawsuits against the Respondents in late 1981 following the announcement of a reduction in force, or RIF, within the CETA Division within the Nebraska Department of Labor. The RIF was to be carried out according to the steps outlined in a July 9, 1981, guideline which had been distributed to CETA Division employees. Although the guideline had been designed as a restatement of the Nebraska Merit System Rules for application to that particular situation, the Petitioners filed lawsuits in Federal Court pursuant to 42 U.S.C. § 1983, alleging that the guidelines improperly lim-

ited the calculation of their "retention points" to only CETA employment and improperly limited their "bumping rights" to positions within CETA. Upon the filing of each of their respective complaints, the United States District Court enjoined the Respondents from terminating the Petitioners' employment; these injunctions remained in effect during the duration of the lawsuit. Trial was held in July, 1982; and on June 17, 1983, the Court entered its judgment in Petitioners' favor.

On or about September 30, 1983, as a result of the cessation of federal funding under the Comprehensive Employment and Training Act, the CETA Division of the Nebraska Department of Labor went out of existence. New divisions, the Division of Job Training and the Greater Nebraska Job Training Program, were created and funded through the federal Job Training Partnership Act. CETA Division employees were given a preference in the hiring process for the new divisions, and all the Petitioners obtained positions within those divisions.

On January 1, 1984, the Nebraska Merit System was merged into the Department of Personnel, creating a single personnel system. The new personnel rules, adopted after notice and public hearing, did not refer to "retention points." Instead, the rules gave the agency head authority to devise a layoff plan specifying the basis for the exercise of bumping rights. The agency head was required to consider quality of service, length of service, any job-related factor, any affirmative action consideration, or combination of the above (Chapter 15, Section 002, Department of Personnel Rules, 1/1/84; Appendix, App. 2).

The Department of Labor then devised a layoff plan which was distributed to staff in September, 1984. Among other details, the procedure sets up a retention points calculation which provides for length of service credits and performance credits. These credits are calculated upon the employee's entire time of service within the Department of Labor. Bumping rights may be exercised to other positions in the same class, lower positions in the same class series, to a class of a position formerly held or lower positions in the same class series. Bumping rights may be exercised on a state-wide basis within the Department of Labor, according to the layoff plan.

In light of the foregoing series of events, it would appear that there is no need for further action in connection with the case. The Merit System agency in which Petitioners were employed at the time the layoff was instituted is no longer in existence. Neither are the rules on which they base their claim to property rights. Whether replacing the Merit System Rules by the State Personnel System Rules constituted an unlawful deprivation is a question for another lawsuit—not this one. Furthermore, the layoff plan presently in effect within the Department of Labor grants the Petitioners essentially all of the benefits to which they claimed they were entitled, with the possible exception of the right to bump across department lines. Neither the U.S. District Court or the Eighth Circuit Court of Appeals indicated their bumping rights were this broad. Therefore, it would seem that the matter is now moot. *Preiser v. Newkirk,* 422 U.S. 395 (1975).

It might also be noted that the issue which the Petitioners believe warrant Supreme Court review, regardless of how resolved, would not affect the ultimate decision. The issue which is said to warrant the granting of a writ of certiorari involves the determination of Petitioners' property or contract rights. Even if the Petitioners are correct in what they say, the outcome will not be different since the Circuit Court also found that whatever rights the Petitioners had were not taken without due process. Even if the Petitioners had the property rights they claimed, the various avenues of administrative and in-court processes provided by the state were found sufficient to overcome their 42 U.S.C. § 1983 claims. Although there is no question but that the basis for the determination of a public employee's property and contract rights is an important question, the Court may not want to devote its time to that issue when its resolution is not determinative of the outcome of the case.

Furthermore, the reasons given by Petitioners for granting the writ are not convincing. Their first argument in favor of granting the writ is that, unless reversed, the decision of the Eighth Circuit could be cited for the erroneous proposition that a state employee's employment contract would be determined with reference to federal, rather than state, law. We fail to see how.

The Circuit Court said:

> The District Court based its determination upon its interpretation of the Merit System Rules. It properly looked to such rules in determining the extent of the employees' property interests, since such interests are created by, and their dimensions and suffici-

ency are judged by, "state law—rules . . . that secure certain benefits and . . . support claims of entitlement." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); see *Bishop v. Wood*, 426 U.S. 341 (1976). In Nebraska, such state law holds that a property interest may arise for a state public employee from the rules and regulations which have become a part of his employment contract. *Weeks v. State Board of Education*, 204 Neb. 659, 663, 284 N.W.2d 843, 846 (1979) (Petitioners' Brief, Appendix, p.7a).

The Court then proceeded to list propositions from other Nebraska cases which were of assistance in ascertaining the contents of the Petitioners' employment contracts. There was a clear and unmistakable reference to the important role of state law.

Petitioners' second argument appears to be no more than a reiteration of their first, but with greater specificity. The Petitioners objected to the Eighth Circuit's decision to ignore alleged representations by their superiors which were contrary to provisions of the Merit System Rules. Both the District and Circuit Courts considered the Merit System Rules as creating an express contract of employment. In Nebraska, there can be no implied contract where there is an express agreement between the parties relative to the same subject matter. *Roth v. Lieske*, 189 Neb. 216, 201 N.W.2d 846 (1972). Furthermore, duly adopted rules are as binding as statutes. *Douglas County Welfare Administration v. Parks*, 204 Neb. 570, 284 N.W.2d 10 (1979). Any contract purportedly made by the assurance given by an officer or agent of the government who is acting in a manner the law does not permit is void and unenforceable. Appeal of *Roadmix Construction Corp.*, 143 Neb. 425, 9 N.W.2d 741 (1943); *City of Plattsmouth*

*v. Murphy,* 74 Neb. 749, 105 N.W. 293 (1905). Each of the foregoing cases, with the exception of *Roth v. Lieske, supra,* was cited by the Eighth Circuit in explaining their decision to focus on the Merit System Rules rather than representations allegedly made by superiors when an express contract covering the same subject matter already existed. The Nebraska cases fully support the Eighth Circuit's position.

The Petitioners then argue that *Halpin v. Nebraska State Patrolmen's Retirement System,* 211 Neb. 892, 320 N.W.2d 910 (1982), is the Nebraska case to rely upon and that its application would produce a different result. Their conclusions are incorrect. That case involved an action in state court for declaratory relief. The plaintiffs were state patrolmen seeking a ruling that each patrolman's lump-sum payment for unused vacation and sick leave should be included in the sum of his or her total salary during the patrolman's final three years of service. The plaintiff wanted this included because his retirement benefit was determined by applying a certain percentage to his "final average monthly salary," which was the sum of his salary over the past three years divided by 36. The action was brought because a long-term practice of including the lump-sum payment was stopped following the receipt of a recommendation from the Attorney General's Office. The Court held that the practice became part of the employment contract and could not constitutionally be impaired by changing the practice. The case is distinguishable from the present one because the statutory language in *Halpin, Id.* did not expressly include or forbid the inclusion of the lump-sum payment in the calculation.

It presents the situation discussed in footnote 2 of the Eighth Circuit's opinion, which states in part: "Such unwritten understandings, however, were viewed as supplementing explicit contractual provisions in the absence of other explicit provisions [citing to *Perry v. Sinderman*, 408 U.S. 593 (1972)]. Since the Merit System Rules expressly state terms of employment, no room is left in the instant case for implied contractual agreements." (Petitioners' Brief, Appendix, p.8a). That the Nebraska Supreme Court would agree with this distinction is found at the end of the Court's opinion in *Halpin*. Although there had been no indication that the long-term practice limited the inclusion of unused vacation and sick leave to that *earned* in the final three years of a patrolman's employment, the Supreme Court, recognizing that the practice could not violate or supplant the express statutory language, stated, "[s]ince the final average monthly salary is calculated upon the total salary paid during the final three years of service, payment received for unused vacation and sick leave accumulated during the final three years of service only should be included in the calculation." *Supra* at 903, 320 N.W.2d at 916. The patrolmen's reasonable expectations were to be honored provided that those expectations were not contrary to the express terms of the contract. In the present case, the employees' expectations could not be honored for the very reason that they were contrary to the express terms of their employment contracts.

As a part of their argument, the Petitioners claimed that the "Eighth Circuit acknowledged *Halpin* . . ., and refused to follow the state law established therein." (Peti-

tioners' Brief, p.10, citing to the Circuit Court opinion at p.19a in the Appendix to their brief). Upon examination of the context of the cited portion of the opinion, it becomes apparent that the part of *Halpin* that the Court was refusing to follow was the part of the Nebraska Supreme Court decision which held that a change in the practice of the retirement system violated the Contract Clause of the United States Constitution. The Nebraska Supreme Court in *Halpin,* as did the Federal District Court in the present case, overlooked the fact that the Constitution forbids a state to *pass a law* impairing the obligation of contracts. A simple breach of contract does not give rise to an action founded on Article 1, Section 10 (See, Appendix, App. 3). As the Circuit Court noted, there must be some legislative action before an unconstitutional impairment may be found. It does not seem necessary for this Court to grant the writ for the purpose of instructing the State Supreme Court on a federal constitutional question arising in an unrelated case.

Petitioners also assert that Nebraska law does not grant any deference to an agency's interpretation of its own rules where the rules constitute an employment contract. They cite to *Drinkwine v. Flebbe,* 219 Neb. 291, — N.W.2d — (1985), and *Halpin v. State Patrolmen's Retirement System, supra.* Drinkwine merely stands for the proposition that one state agency cannot ignore the terms of a legislatively authorized contract between state employees and another agency. Neither case makes any statement concerning the amount of deference to be given an agency's interpretation of its own rules. This Court, however, in *Board of Education v. McCluskey,* 458 U.S.

966 (1982), indicated that it was inappropriate for a Federal Court to fail to give deference to a local school board's interpretation of its own rules. *See also Bowles v. Seminole Rock and Sand Company,* 325 U.S. 410, 413-14 (1945).

Furthermore, it seems likely that if the Nebraska Supreme Court was squarely confronted with the issue it would be decided in favor of granting substantial deference to the interpretation of the administrative agency. For instance, in *Haven Home, Inc. v. Department of Public Welfare,* 216 Neb. 731, 346 N.W.2d 225 (1984), the state Court relied upon *Alabama Nursing Home Association v. Harris,* 617 F.2d 388 (5th Cir. 1980), for the proposition that, "[a] presumption of validity attaches to the actions of administrative agencies. While the presumption is rebuttable, the burden of proof rests with the party challenging the agency's action." 216 Neb. at 736, 346 N.W.2d at 229. The Court further stated, "This Court may not substitute its judgment for that of the DPW [Department of Public Welfare]. . . ." 216 Neb. at 736, 346 N.W.2d at 229. It also should be noted that the language the Nebraska Supreme Court excerpted from *Alabama Nursing Home Association v. Harris, supra,* was referred to by the Fifth Circuit as being the federal law applicable to a review of challenged actions of the United States Department of Health, Education and Welfare. Therefore, federal administrative law has precedential value in Nebraska.

Next the Petitioners argue that the Eighth Circuit ignored the Commissioner of Labor's supposed authority to make the alleged representations to the Petitioners.

They are apparently claiming that the Commissioner had authority to make contracts with them that violated the Merit System Rules. Ironically, one of the cases relied upon by the Petitioners in their previous argument. *Drinkwine v. Flebbe,* 219 Neb. 291, — N.W.2d — (1985), clearly indicates that the Petitioners' position is untenable. One state agency cannot ignore the legislatively authorized actions of another agency. Furthermore, even the District Court chose to rely primarily upon the express wording of the Merit System Rules as it was unclear just what representations were made to Petitioners by their superiors. "The Merit System Rules provide the answer," the Court said. (Petitioners' Brief, Appendix, p.56a). The Lower Court Memorandum Opinion contained an extensive discussion of the confusion surrounding the alleged representations (Petitioners' Brief, Appendix, pp. 41a-43a). One of the explanations mentioned by the Court was that any assurances given to the Petitioners to the effect that they would not lose seniority rights may have been directed at their vacation and sick leave benefits—which by state law are applied across state agency lines—other than their rights in the event of an unforeseen layoff.

In addition, Petitioners have claimed that the Commissioner had the authority to make binding determinations of the Merit System Rules and that the director of the Merit System did not. In support of the former assertion, Petitioners have cited to Neb.Rev.Stat. §81-112, which gives department heads authority to prescribe regulations regarding the governance of their department. This authority was exercised by including the CETA

Division as a member agency of the Merit System, which had properly promulgated personnel rules for member agencies pursuant to the Nebraska Administrative Procedures Act, Neb.Rev.Stat. §84-901 et seq. (Reissue 1981). As indicated in §81-112 (Petitioners' Brief, Appendix, p. 94a), any regulations the department head was authorized to make must be consistent with existing law. Therefore, any attempt to make rules inconsistent with the Merit System Rules would have been beyond his authority.

The Petitioners have also relied upon sections within Neb.Rev.Stat. §§48-601 through 669 to support their argument. The sections relied upon, even if applicable to this case, would not overcome the fact that the Commissioner's authority would be limited by validly enacted statutes and regulations covering the same subject matter. One need not reach that point, however, since the aforementioned sections apply exclusively to the Department of Labor's Division of Employment which was created in conjunction with the Wagner-Peyser Act, 29 U.S.C. §49 et seq. Neb.Rev.Stat. §48-601 indicates that §§48-601 through 669 are the "Employment Security Law." (Appendix, App. 3). The portion of §48-616 referring to "An act to provide for the establishment of a national employment system," which Petitioners apparently read as referring to the Comprehensive Employment and Training Act, actually refers to the system of unemployment compensation. This is evidenced not only by the title of the Nebraska law but by the further reference in the statute that the federal legislation was approved on June 6, 1933. Obviously, the Comprehensive Employment and Training Act is of much more recent vintage.

Petitioners further claim that the Commissioner of Labor is the "[u]ltimate authority in deciding how the Merit System Rules are interpreted and applied. . . ." (Petitioners' Brief p.13, 14). In support of this assertion, Petitioners have cited two of the Merit System Rules which indicate that in appeals of dismissal, suspension, or demotion the Merit System council merely makes a recommendation to the appointing authority. The appointing authority then has the final say. (Merit System Rule 13a) (1978); (Petitioners' Brief, Appendix, p.99a). The rule says nothing which indicates interpretations of the Merit System Rules are left up to the head of a member agency. The cited provision (the other one cited was no more than a previous version of the above) is simply an acknowledgement of a provision of the Nebraska Constitution giving agency heads the authority to, "Appoint and remove all subordinate employees in their respective departments." Neb. Const., Art. IV, §1 (See, Petitioners' Brief, Appendix, p.92a).

Conversely, Petitioners state that the director of the Merit System, "Has no authority to establish terms of employment or render binding opinions on construction of the Merit System Rules," citing to Neb.Rev.Stat. §§81-894,895,896 and §81-8,100. It should be noted that the above sections were repealed in 1951. *See,* Laws 1951, Chapter 311, Section 11. Further, although the cited sections may show what certain functions of the director were at one time in the past, they certainly do not disprove that the director has additional authority. The director clearly does have the authority to render binding opinions on the construction to be given the Merit System Rules. *See,*

Merit System Rule 20(4) (a-d) and Rule 3(7) (n) (1978) (Appendix, App. 4). Also see Neb.Rev.Stat. §84-912 (Reissue 1981) (Appendix, App. 3). Insofar as the Merit System director's authority to establish terms of employment is concerned, Respondents have not argued that he has such authority. Rather, it is the properly promulgated Merit System Rules which establish such terms. It is unclear just where Petitioners are attempting to go with their argument. It almost seems that they are trying to say that the Merit System Rules are void and that it is the oral representations of their superiors—whatever those might have been years ago—which are all-important. It seems odd for Petitioners to take this tact now since a review of their complaints would disclose that they primarily rested their claim of entitlement upon the Merit System Rules.

The Eighth Circuit was correct in giving weight to the Merit System director's interpretation of the Merit System Rules and regulations. The Court did not ignore the authority of the Commissioner of Labor as claimed.

In the last part of their argument, the Petitioners claimed that the Circuit Court failed to apply the law that was in existence at the beginning of their employment with the CETA Division. They complained that the Court considered the 1978 Merit System Rules as the controlling rules. The Court, however, indicated that its interpretation of the earlier versions of the rules was consistent with the interpretation it gave to the 1978 rules. (Petitioners' Brief, Appendix, p.11a-12a). Further, the District Court had previously concluded, "that the rights of

the manner of calculation did not vest in the plaintiffs prior to the time of the layoff." (Petitioners' Brief, Appendix, p.60a). The Court had also concluded that the 1978 rules were controlling on the question of bumping rights (Petitioners' Brief, Appendix, p.61a). Neither determination was appealed by Petitioners. Therefore, the reference to the 1978 version as "controlling" would not have been erroneous or prejudicial. Perhaps even more important is the fact that the issue of whether the state may change a personnel rule such as the one involved here without running afoul of the Constitution was not raised or discussed at length in the Circuit Court. It is a question thus left to another lawsuit. Petitioners' complaints alleged that it was the July 9, 1981, RIF guideline that deprived them of their rights. They did not claim that it was the amendments to the Merit System Rules in effect at the time they were hired that deprived them of their rights It would be inappropriate to allow them to relitigate the case at this late stage.

## CONCLUSION

The law in Nebraska has not been ignored by the Eighth Circuit. Instead, the Court applied that law in determining the scope and sufficiency of Petitioners' claimed property interests in their contracts of employment, as required by *Bishop v. Wood,* 426 U.S. 341 (1976) and *Board of Regents v. Roth,* 408 U.S. 564 (1972). While it is true that the Circuit Court cited the case of *Halpin v. State Patrolmen's Retirement System,* 211 Neb. 892, 320 N.W.2d 910 (1982), as being contrary to its conclusion, it did so with respect to a conclusion by the Nebraska Supreme Court that a simple breach of contract equated to a

violation of the Contract Clause of Article 1, Section 10, of the Constitution. The Contract Clause, while forbidding a state from passing a law which impairs the obligation of contracts, does not reach alleged breaches which are caused by something other than legislative action. *Allied Structural Steel Company v. Spannaus,* 438 U.S. 234 (1978); *United States Trust Company v. New Jersey,* 431 U.S. 1 (1977); *New Orleans Waterworks Company v. Louisiana Sugar Refining Company,* 125 U.S. 18 (1888). By deciding this federal constitutional question in accordance with the decisions of this Court but contrary to the Nebraska Supreme Court, the Eighth Circuit can hardly be accused of violating the precepts of *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). That case stands for the proposition that, "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Id.* at 78. The interpretation of the Commerce Clause is obviously a matter "governed by the Federal Constitution." The Circuit Court did not step outside the authority granted to it. Therefore, there are no special or important reasons for granting the Writ of Certiorari to this Court and the Respondents request that the petition for the Writ be denied.

Respectfully submitted,

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## APPENDIX

May 22, 1974

Mr. Donald Bumgarner
Personnel Officer
Division of Employment
550 South 16th Street
Lincoln, Nebraska 68508

Dear Mr. Bumgarner:

In reply to your question concerning seniority rights in the Merit System.

Seniority rights apply only to the agency, or office, or department in which they are held. They are not transportable from one Merit System agency, office or department.

There is a difference, however, between seniority rights and continuous service for credit towards sick leave, annual leave and retirement. An individual who works for one agency, office or department in State Government and within a period of less than one year leaves that agency and transfers to another agency maintains their continuous service record for credit toward allowance for sick leave, annual leave or retirement. This particular section is called to your attention so that neither you nor an employee will confuse this right of credit for continuous service with seniority rights for purposes of promotion, pay raise or in the event of a reduction in force or a termination or the discontinuance of an agency or program.

To summarize, seniority rights apply only to the specific program area in which an employee works. Continuous service rights for fringe benefits apply for any State Government operation and are transportable. To repeat, seniority rights are not transportable from agency to agency.

Sincerely yours,

James T. Edington
Merit System Director

JTE/jlc

## Chapter 15—Resignations and Layoffs

*002 Layoffs.* The agency head decides when a layoff is necessary, which classes will be affected, and if the layoff will be limited to a facility.

*002.01* Agency heads shall send the Director of Personnel a copy of their layoff plan prior to the initiation of any layoff. Details concerning which classes to be affected first are not necessary. Details which should be included are on what basis bumping rights are to be exercised, and any affirmative action considerations.

*002.02* Employees to be laid off shall be given a 15 workday notice prior to layoff, except that when emergency funding situations exist, this notice period can be shortened with the approval of the Director of Personnel.

*002.03* Agency heads shall decide how bumping rights can be exercised. The basis for bumping shall be quality of service, length of service, any job-related factor, any affirmative action consideration, or any combination of these.

*002.04* Employees occupying positions designated for layoff may bump employees with lesser retention privileges, as determined by the agency, out of:

—positions of the same class;

—lower positions within the same class series;

—classes the employee previously occupied;

—lower positions within the same class series as the employee previously occupied.

*002.05* The agency head shall establish by facility or geographical areas or by total agency where bumping rights may be exercised.

*002.06* Bumping rights shall not take place between agencies.

## THE CONTRACT CLAUSE OF ARTICLE I, SECTION 10, OF THE UNITED STATES CONSTITUTION:

No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

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Neb.Rev.Stat. §48-601. Act, how cited. Sections 48-601 to 48-669 shall be known and may be cited as the Employment Security Law.

Source: Laws 1937, c. 108, § 1, p. 370; Laws 1941, c. 94, § 14, p. 401; C.S.Supp., 1941, § 48-701; R.S. 1943, § 48-601; Laws 1949, c. 163, § 1, p. 417; Laws 1953, c. 167, § 1, p. 520; Laws 1981, LB 470, § 1.

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Neb.Rev.Stat. §84-912. Agency; applicability of rule; declaratory ruling; review of ruling. On petition of any interested person, any agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged unless it is altered or set aside by a court. Such a ruling is subject to review in the manner provided in sections 84-917 to 84-919, for the review of decisions in contested cases. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

Source: Laws 1959, c. 456, § 5, p. 1512; Laws 1979, LB 137, § 1.

NEBRASKA MERIT SYSTEM RULES
February 16, 1978

3(7) *Duties of the Nebraska Joint Merit System Director:* The Nebraska Joint Merit System Director shall: . . . (n) Perform duties necessary or proper for making effective these Rules and all policies and procedures adopted in pursuance thereof. The power of the Director to make effective the provisions of these Rules shall not be deemed to be contingent on the adoption of policies and procedures; but, in the absence of policies that are applicable, the Director shall have power to take such action, not inconsistent with these Rules as may be reasonably necessary and proper to effectuate the purposes thereof; and . . .

20(4)(a) Any person may make a written request for a declaratory judgment as to provisions of these Rules or other written statement of law or policy, decision or order of the Council the Director or other authorized person.

20(4)(b) No special form or procedure shall be required for a declaratory judgment. The request must state specifically the Rule, written statement of law, policy, decision or order concerned and enough information must be presented in the posed question so it may be answered completely and accurately.

20(4)(c) Answers to requests for declaratory judgments will be made within fifteen (15) working days of the receipt of the request, unless the request must be answered by the Council. In the latter instance the request will be presented to the Council at their next regularly scheduled meeting and answer will be made within fifteen (15) working days following that Council meeting. If it is

necessary the request be presented to the Council, petitioner will be notified of such action.

20(4)(d) Declaratory rulings made by the Council, the Director or other authorized persons shall have the same status as a decision or order in a contested case.